92-1082

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BLACK AND DECKER, INC.,
Petitioner,

v.

JERRY L. ROSS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the award of punitive damages in a diversity action against Black & Decker without use of post-verdict review criteria approved by this Court in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032, 1043 (1991), violates Black & Decker's due process rights.

2. Whether the appellate post-verdict review of the punitive damage award violates Black & Decker's Seventh Amendment right to a trial by jury.

PARTIES TO THE PROCEEDINGS

Petitioner Black & Decker (U.S.) Inc., sued herein as Black and Decker, Inc., pursuant to Rule 29.1 of the Rules of this Court, states that it is an indirect wholly-owned subsidiary of Black & Decker, Inc. Black & Decker, Inc. is a wholly-owned subsidiary of The Black & Decker Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Black & Decker (U.S.) Inc. ("Black & Decker"), sued as Black and Decker, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App., *infra*, 1a-21a) is reported at 977 F.2d 1178 (7th Cir. 1992). The ruling of the United States District Court for the Northern District of Illinois ("District Court"), on petitioner's motion for judgment

notwithstanding the verdict, or in the alternative, for new trial, or in the alternative, for a remittitur, is not reported (App., *infra*, 22a-24a). The order of the United States Court of Appeals for the Seventh Circuit on Black & Decker's petition for rehearing and suggestion, in the alternative, for rehearing in banc (App., *infra*, 25a-26a) is reported at No. 91-2670, 1992 U.S. App. LEXIS 31438 (7th Cir. Dec. 2, 1992).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 21, 1992. A petition for rehearing and suggestion, in the alternative, of rehearing in banc was denied on December 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall . . . . be deprived of life, liberty or property, without due process of law . . . .

U.S. Const. amend. V.

The Seventh Amendment to the United States Constitution provides, in relevant part:

> In Suits at common law . . . no fact tried by a jury shall be otherwise re-examined in any Court of the United States . . . .

U.S. Const. amend. VII.

STATEMENT

This Court recently granted certiorari in the case of *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W.Va. 1992), *cert. granted*, 61 U.S.L.W. 3206 (U.S. Nov. 30, 1992) (No. 92-479). Like *TXO*, this case

presents another instance of punitive damages "run wild." *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032, 1043 (1991). Unlike *TXO*, however, this case concerns the existing conflict among the federal circuits regarding the application of *Haslip* in federal courts exercising diversity jurisdiction.

The lawsuit began as a products liability action sounding in negligence and strict liability. Jerry L. Ross ("Ross") sought recovery for a serious hand injury incurred while using a Miter Box electric saw Black & Decker designed, manufactured, and sold. The jury awarded $2 million in compensatory damages and $10 million in punitive damages. Although the punitive award exceeded the compensatory award by five-fold, and was rendered without the procedural safeguards deemed essential by this Court in *Haslip*, the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") affirmed the award of punitive damages subject to a remittitur of $5 million.

In so doing, the Seventh Circuit did not analyze the punitive damage award in accordance with the *Haslip* factors approved by this Court; rather it upheld the propriety of the punitive damage award by reference to state post-verdict review criteria not submitted to the jury through instructions. The state-based criteria utilized by the Seventh Circuit are constitutionally infirm and their use by the Seventh Circuit abridged Black & Decker's right to a trial by jury.

1. In July 1990, respondent filed a products liability action against Black & Decker in Illinois state court for injuries sustained to his left hand while using a Miter Box electric saw marketed by Black & Decker. App., *infra*, 1a. Pursuant to 28 U.S.C. Section 1441(a), Black & Decker removed the action to federal district court based on diversity of citizenship as provided by 28 U.S.C. Section 1332. App., *infra*, 1a-2a.

2. At trial, Ross maintained that the saw was defective and unreasonably dangerous because it lacked a lower right saw blade guard. App., *infra*, 4a-5a. Conflicting evidence was introduced as to whether inclusion of a blade guard would have prevented the injury. App., *infra*, 6a. At the time of sale, the saw conformed to written safety standards enacted by Underwriters Laboratory ("UL"), an independent not-for-profit organization that tests products and formulates industry safety standards. App., *infra*, 21a.[1] The jury found Black & Decker liable for Ross's injury, and awarded $2 million in compensatory damages and $10 million in punitive damages.[2] Black & Decker filed a motion for judgment notwithstanding the verdict or, in the alternative, for new trial. That motion was denied by the District Court. App., *infra*, 24a. The District Court stated only that the amount of the award was not "excessive or unreasonable under the evidence,"

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[1] Over objection, the district court permitted respondent to introduce evidence that in 1982, four years after the sale of the saw at issue, UL issued safety standards requiring a lower right blade guard on saws, and subsequent to 1982, Black & Decker added lower right blade guards to its saws. App., *infra*, 18a. It is Black & Decker's corporate policy only to market products that comply with safety standards enacted by UL. App., *infra*, 18a. Further, the district court, over objection, permitted respondent to offer evidence of two other Miter saw accidents subsequent to Ross's injury. App., *infra*, 11a.

[2] The parties agreed upon the following punitive damage jury instruction that the district court submitted to the jury: "If you find that the defendant's conduct was willful [sic] and wanton and proximately caused injury to the plaintiff, and if you believe that justice and the public good require it, you may, in addition to any damages to which you find the plaintiff entitled, award an amount which will serve to punish the defendant and to deter others from the commission of like offenses. When I use the expression 'willful [sic] and wanton conducted [sic],' I mean a course of action which shows an utter indifference to or conscious disregard for the safety of others." Tr. 451-452. (The page numbers of the trial transcript are referred to as "Tr. ——"; they are not otherwise paginated in the record.)

App., *infra*, 23a, and declined to remit the award. App., *infra*, 20a. In overruling Black & Decker's argument that punitive damages were not supported by the evidence, the District Court wrote that the "clear weight of the evidence also supports a verdict of punitive damages." App., *infra*, 23a.

3. Despite the District Court's failure to conduct a "meaningful individualized assessment" of the punitive damages award as required by *Haslip*, 111 S.Ct. at 1044, the Seventh Circuit affirmed. Without citing *Haslip*, the Seventh Circuit also rejected Black & Decker's argument that punitive damages were not supported by the evidence, App., *infra*, 16a-19a, but agreed that the punitive award was excessive and should be remitted from $10 million to $5 million. App., *infra*, 21a.

In considering the reasonableness of the punitive damage award, the Seventh Circuit stated that while state substantive punitive damage law applies, federal procedure governs the district court's review of the jury award, and appellate review of the district court's decision is conducted under an abuse of discretion standard. App., *infra*, 19a. The Seventh Circuit then limited its analysis of the punitive damage award to three post-verdict review criteria prescribed by *Hazelwood v. Illinois Central Gulf Railroad*, 114 Ill.App.3d 703, 712-14, 450 N.E.2d 1199, 1207 (1983). App., *infra*, 19a-20a.

> Three factors are especially relevant in analyzing the amount of punitive damages awards under Illinois law: '(1) the nature and enormity of the wrong, (2) the financial status of the defendant, and (3) the potential liability of the defendant resulting from multiple claims.' (citation omitted)

App., *infra*, 19a.

Considering only these three enumerated criteria, the Seventh Circuit upheld the award of punitive damages. App., *infra*, 20a. The Seventh Circuit, however, held:

"Nevertheless . . . we conclude that the award of $10,000,000 is excessive and that the district court judge abused his discretion in refusing to modify it." App., *infra*, 20a-21a. The Seventh Circuit reached "this conclusion in part because the saw which injured the plaintiff was not in violation of any UL standards as of the date of its manufacture or its sale to the general public (although it was in violation on the day Ross was injured), and this fact should have been taken into consideration as mitigating somewhat the wrong committed by B & D." App., *infra*, 21a.[3]

REASONS FOR GRANTING THE PETITION

The decision of the Seventh Circuit denies Black & Decker the procedures approved by this Court in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991) as satisfying due process guarantees; it upholds constitutionally infirm state punitive damages law; and it sanctions a post-verdict review of punitive damages in derogation of Black & Decker's Seventh Amendment rights. The Seventh Circuit's decision is in conflict with other federal circuit court decisions rendered post-*Haslip*. This Court's review, therefore, is necessary to resolve these conflicts among the circuits and to ensure that litigants in federal cases involving diversity jurisdiction are afforded the full panoply of protections mandated by *Haslip*.

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[3] The Seventh Circuit failed to address the effect of the District Court permitting respondent to introduce evidence of two subsequent injuries involving Miter saws. Under Illinois law, post-occurrence evidence is inadmissible on punitive damage liability, and should not have been considered by the jury on that question. *Kemner v. Monsanto Co.*, 217 Ill.App.3d 188, 212, 576 N.E.2d 1146, 1161, *cert. denied*, 142 Ill.2d 655, 584 N.E.2d 130 (1991) ("Post-accident occurrences or injuries involving the same or substantially similar products may not be used to show that a manufacturer acted in conscious disregard of the safety of others and cannot support a claim of punitive damages.") (citing *Bass v. Cincinnati, Inc.*, 180 Ill.App.3d 1076, 1083-84, 536 N.E.2d 831, 835 (1989)).

1. In *Haslip*, this Court unpheld Alabama's scheme for awarding punitive damages against an attack that punitive awards had become the product of unbridled jury discretion in violation of the Due Process Clause. 111 S.Ct. at 1046. Vital to this Court's affirmance are the three levels of safeguards present under Alabama law: (1) jury instructions that limit the discretion granted to juries in determining punitive damages, *id.* at 1044; (2) a post-verdict hearing by the trial court with consideration of specified factors, *id.*; and (3) de novo appellate review by the Alabama Supreme Court with "detailed substantive standards." *Id.* at 1045. In the absence of these case-specific considerations, the relationship between the amounts of punitive and compensatory damages is insufficient, standing alone, to support the rationality required by due process. *Id.* at 1044-45. Unlike the petitioner in *Haslip*, Black & Decker was denied "the full panoply of [such] procedural protections." *Id.* at 1046. The $10 million punitive award was subjected to no "meaningful and adequate review by the trial court." *Id.* at 1044. The Seventh Circuit similarly failed to provide a "definite and meaningful constraint on the discretion of [the] fact finders," *id.* at 1045, and approved the punitive award (subject to the remittitur) without the procedural safeguards afforded by *Haslip*.

a. Under the Alabama scheme approved by this Court in *Haslip*, "trial courts are 'to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so . . . .' Among the factors deemed 'appropriate for the trial court's consideration' are the 'culpability of the defendant's conduct,' the 'desirability of discouraging others from similar conduct,' the 'impact upon the parties,' and 'other factors, such as the impact on innocent third parties.' " *Id.* at 1044 (citations omitted) (quoting *Hammond v. City of Gadsden*, 493 So.2d 1374, 1379 (Ala. 1986)).

In contrast to the approved approach, the District Court denied Black & Decker's post-trial motions without re-

flecting its reasoning. App., *infra*, 22a-24a. The decision by the Seventh Circuit upholds the methodology employed by the District Court in disposing of Black & Decker's post-trial motions on punitive damages.

Such cursory approvals of punitive damage awards by federal courts post-*Haslip* have been held to violate due process. In *American Employers Insurance Co. v. Southern Seeding Services, Inc.*, 931 F.2d 1453 (11th Cir. 1991), where the jury awarded $400,000 in compensatory damages and $750,000 in punitive damages, the court found that the federal district court's post-verdict review of a punitive damage award did not conform to *Haslip* because the trial court denied post-trial motions "without comment." *Id.* at 1458. While recognizing that *Haslip* was litigated in state rather than federal courts, *id.* at 1457, the court neverthless remanded to the district court to enunciate in the record its review of the post-verdict safeguards required by state law and approved in *Haslip*. *Id.* at 1458.

Similarly, in *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991), a federal district court summarily rejected a defendant's motion to remit a punitive damage award. *Id.* at 1347. Due to the inadequate post-verdict review, and the *Haslip* decision, the court "remand[ed] for the district court to articulate its analysis under Arkansas law and to review the award under the criteria approved in *Haslip* . . . as well as principles enumerated in the Arkansas cases." *Id.* *See also Cole v. Control Data Corp.*, 947 F.2d 313, 320 (8th Cir. 1991) (remanding to federal district court to conduct review "under the standards articulated in *Haslip* . . . applying the appropriate principles of Missouri law."); *Doe by Doe v. B.P.S. Guard Services, Inc.*, 945 F.2d 1422, 1428 (8th Cir. 1991) (remanding case for "consideration of the post trial motion in light of *Haslip* and controlling Missouri authority.").

In each of the foregoing diversity actions, the appellate court reversed an award of punitive damages and remanded to the federal district court to conduct the required post-verdict review mandated by the Due Process Clause and delineated in *Haslip*. By contrast, the Seventh Circuit affirmed the actions of the District Court despite its failure to conduct on the record a meaningful post-verdict review of the punitive award. The absence of a constitutionally sufficient post-verdict review is identical to the records declared deficient by the Eighth and Eleventh Circuits. Review is merited by this Court to resolve the existing conflict among the circuits as to the nature and extent of the post-verdict review required by *Haslip* of federal district courts exercising diversity jurisdiction.

b. Black & Decker was deprived of its due process rights at the appellate level. The Seventh Circuit did not address the District Court's summary rejection of Black & Decker's post-trial punitive damage motions, and in passing, noted that the District Court dismissed Black & Decker's motion to remit a portion of the punitive award. App., *infra*, 20a. The decision of the Seventh Circuit to uphold, rather than overturn, the federal district court's cursory treatment of Black & Decker's post-trial motions is in conflict with the safeguards approved by this Court in *Haslip*, and runs afoul of decisions requiring detailed post-verdict reviews of punitive awards. *See, e.g., Cole*, 947 F.2d at 320; *Doe by Doe*, 945 F.2d at 1428; *American Employers Insurance Co.*, 931 F.2d at 1458; *Robertson Oil Co.*, 930 F.2d at 1347.

Where post-verdict review of a punitive award is absent or insufficient under *Haslip*, an appellate court is required to reverse and remand to the trial court to conduct the constitutionally mandated post-verdict review. Here, however, the Seventh Circuit conducted its own constitutionally infirm post-verdict review, and applied the post-verdict punitive damage criteria set forth by Illinois state law without testing the sufficiency of those criteria against the standards approved in *Haslip*. Had the Sev-

enth Circuit analyzed the adequacy of Illinois punitive damage law post-*Haslip*, it necessarily would have concluded that the law of Illiniois fails to afford litigants the due process protections mandated by *Haslip*.

Post-*Haslip*, federal courts have measured state post-verdict review standards against *Haslip* to ensure that any punitive award is constitutionally grounded. *See, e.g., Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1414-18 (4th Cir. 1992); *Cole*, 947 F.2d at 319-20; *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 101-08 (4th Cir. 1991); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1095-99 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1778 (1992); *Union National Bank of Little Rock v. Mosbacher*, 933 F.2d 1440, 1447-48 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 870 (1992); *American Employers Ins. Co.*, 931 F.2d at 1458.

In *Mattison*, for example, the Fourth Circuit ruled that fundamental due process guarantees require that a state punitive damages scheme be measured against *Haslip* to ensure that any such award passes constitutional muster. In reviewing the award of $125,000 in compensatory damages and $100,000 in punitive damages in a diversity action applying South Carolina law, the *Mattison* court recognized:

> The first principle of due process embraces a rule of law which contains standards that can be known in advance, conformed to, and applied rationally. The doctrine of the supremacy of law is 'a doctrine that the sovereign and all its agencies are bound to act upon principles, not according to arbitrary will; are obliged to follow reason instead of being free to follow caprice.'

947 F.2d at 101 (quotation omitted).

In applying this "first principle of due process," the *Mattison* court found that any review of a punitive damage award under state law by a federal court exercising diversity jurisdiction begins with an assessment of the

constitutionality of that law under *Haslip* criteria. *Id.* at 105. The *Mattison* court reasoned that under then applicable South Carolina law,[4] a court could only set aside a punitive award when it was "so shockingly excessive as manifestly to show that the jury was actuated by caprice, passion or prejudice." *Id.* at 100 (citations omitted). Furthermore, the South Carolina punitive damage scheme failed to ensure " 'that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages.' " *Id.* at 104 (quoting *Haslip*, 111 S.Ct. at 1045).

The M*attison* court held that South Carolina law violated the Due Process Clause and afforded no *Haslip* protections. *Id.* at 105. Due to South Carolina's embrace of the "caprice, passion or prejudice" post-verdict review standard questioned by this Court in *Haslip*, 111 S.Ct. at 1045 n.10, and the absence of any requirement that the punitive award bear an "understandable relationship to compensatory damages," *id.* at 1045, the Fourth Circuit found that its "sensibilities about that process [were] offended." *Mattison*, 947 F.2d at 105. For the Fourth Circuit, this lack of a proportionality requirement between compensatory and punitive damages compelled it "to conclude that the scheme violates the *first principle of due process.*" *Id.* (emphasis added).

Like the South Carolina law declared unconstitutional in *Mattison*, Illinois law does not require that punitive damages be proportional to compensatory damages. Rather, Illinois law expressly holds:

> There is no requirement that the amount of punitive damages imposed on a defendant bear any particular proportion to the size of the plaintiff's compensatory award.

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[4] The South Carolina law found constitutionally infirm in *Mattison* was revised to comply with *Haslip* in *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991).

Deal v. Byford, 127 Ill.2d 192, 204, 537 N.E.2d 267, 272 (1989); *Ekl v. Knecht*, 223 Ill.App.3d 234, 243, 585 N.E. 2d 156, 164 (1991). Indeed, Illinois courts have upheld punitive awards having 19:1 and 15:1 ratios to the compensatory awards in *Deal*, 127 Ill.2d at 204, 537 N.E.2d at 272, and *Ekl*, 233 Ill.App.3d at 243, 585 N.E.2d at 164, respectively. Such "wildly unpredictable" awards in the absence of proportionality constraints demonstrate the failure of Illinois law to define adequately a punitive damage scheme that may be rationally applied. *Haslip*, 111 S.Ct. at 1059-60 (O'Connor, J., dissenting).

In addition to rejecting any proportionality requirement, Illinois courts will not disturb a punitive damage award unless the award is the result of "passion, partiality or corruption." *Harriss v. Elliott*, 207 Ill.App.3d 384, 389, 565 N.E.2d 1041, 1044 (1991) (citing *Deal*, 127 Ill.2d at 204, 537 N.E.2d at 272). As this Court suggested, and the Fourth Circuit in *Mattison* confirmed, the "passion, partiality or corruption" standard is constitutionally deficient in the absence of the full panoply of Alabama-style due process protections.[5] The Eighth Circuit, however, in *Lantham Seed Company v. Nickerson Plant Breeders, Inc.*, Nos. 90-2486, 90-2550, 1992 WL 319680 at *7 (8th Cir. Nov. 9, 1992), expressly rejects

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[5] Similarly, state courts post-*Haslip* have struck down state punitive damage law that uses the "passion, partiality, or corruption" standard of review at the trial court level. *See Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897, 908 (1992). Other state courts have embarked upon similar reviews of state punitive damage standards in light of *Haslip*. *See, e.g., Gamble*, 305 S.C. at 104, 406 S.E.2d at 354 (establishing eight factors for post-trial review of punitive damages); *Alexander & Alexander v. Evander*, 88 Md.App. 672, 720-22, 596 A.2d 687, 711-12 (1991), *cert. denied*, 326 Md. 435, 605 A.2d 137 (1992) (reviewing compliance of Maryland punitive damage low post-*Haslip*). *See also Texas Farmers Insurance Co. v. Soriano*, No. 04-90-00222-CV, 1992 WL 350627 at *15 (Tex.App. Nov. 30, 1992) (Peeples, J., dissenting) ("I think the Texas procedures for reviewing exemplary damage awards—certainly as applied by the majority—do not satisfy *Haslip*.").

the "contention that a 'passion and prejudice' standard of review cannot satisfy constitutional due process requirements after *Haslip*." Likewise, the Fifth Circuit in *Glasscock*, 946 F.2d at 1098, dismisses the "implication that a 'passion and prejudice' standard of review can never withstand constitutional scrutiny after *Haslip*." Given the Seventh Circuit's failure to address the constitutional propriety of the Illinois' "passion, partiality or corruption" post-verdict review standard, and the direct conflict among the Fourth, Fifth and Eighth Circuits interpreting this Court's intimation that this standard is consitutionally suspect in the absence of the full panoply of Alabama-style due process protections, 111 S.Ct. at 1045 n. 10, review is merited to resolve this conflict among the circuits.

2. Additionally, Black & Decker was denied its Seventh Amendment right to a trial by jury at the appellate level. In conducting its review of the punitive award, the Seventh Circuit applied de novo the post-verdict review criteria prescribed in *Hazlewood v. Illinois Central Gulf Railroad*, 114 Ill.App.3d 703, 712-14, 450 N.E.2d 1199, 1207 (1983). These *Hazlewood* factors, however, were not included in the District Court's punitive damage jury instruction. The Seventh Circuit's de novo engrafting of the *Hazelwood* factors onto an already infirm punitive damage post-verdict review violates Black & Decker's Seventh Amendment right to a trial by jury.

It is fundamental that a federal court in a diversity action must apply state substantive law and federal procedural law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The allocation of fact-finding responsibility between the trial judge and the jury is a procedural matter and, as such, is guided by Seventh Amendment principles. *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958). Although a state court in assessing punitive damages may apportion fact-finding respon-

sibilities between judge and jury, *see Mattison*, 947 F.2d at 99 n.1 ("the Seventh Amendment is not binding on the states.") (citing *Hardware Dealer Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931); *Pearson v. Yewdall*, 95 U.S. 294, 296 (1877)), in federal court, the jury alone must perform this function. So as not to invade the fact-finding province of the jury, the role of a federal district court reviewing a punitive damage award is to determine whether the verdict is within the confines set by the state law, and to determine by reference to Rule 59, whether a new trial or remittitur should be ordered; appellate review then is conducted under an abuse of discretion standard. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989).

Post-*Haslip*, a district court sitting in diversity must instruct the jury on the totality of the substantive state law of punitive damages, *Cash v. Beltmann North American Co., Inc.*, 900 F.2d 109, 110 (7th Cir. 1990), including post-verdict factual considerations. *Hugo's Skateway*, 974 F.2d at 1416. To protect a litigant's Seventh Amendment rights and to remain faithful to *Erie*, the Fourth Circuit recently held that a federal district court exercising diversity jurisdiction and applying state law must incorporate that state's post-verdict punitive damage review criteria into the jury instruction. *Id.* (citing *Mattison*, 947 F.2d at 108-09). As explained by the Fourth Circuit:

> For example, in *Haslip* the Supreme Court upheld Alabama's scheme, despite jury instructions which gave broad discretion to the jury, in light of the seven-factor review of the punitive damages award by the trial court, in addition to appellate review of the trial court's decision. If the same case were to later arise in federal court in Alabama, *Erie* would require the same factors considered by the court under state law to be considered in assessing punitive damages in

> federal court and, in our view, federal procedure would require that these factors be given to the jury for consideration and be reviewed by the district court under the standards given in Fed. R. Civ. P. 50(b) and 59.

Id. at 1416 n.9. In this fashion, the federal jury remains the sole fact-finder, combining the roles of the state-court jury and judge. And the appellate court, in conducting a post-verdict review of the punitive award, will not usurp the function of the jury by weighing evidence under state-law criteria not submitted to the jury through instructions. *Id.* at 1416; *Mattison*, 947 F.2d at 99. *See also Keenan v. City of Philadelphia*, No. 91-1306, 1922 WL 370033 at *22 n.29 (3rd Cir. Dec. 17, 1992) (Higginbotham, J., dissenting) (citing *Mattison* with approval); *Lightning Lube, Inc. v. Witco Corporation*, No. 87-3243, 1992 WL 212103 at *16-17 (D.N.J. Sept. 2, 1992) (applying *Hugo's Skateway*); *Peoples Bank & Trust Co. of Mountain Home v. Globe Intern., Inc.*, 786 F.Supp. 791, 801 (W.D.Ark. 1992) ("The Seventh Amendment does not permit a federal court to substitute its judgment for that of a jury, as long as the jury operates within the constraints of law and the evidence.") (citing *Mattison*), *aff'd and remanded on other grounds*, 1992 WL 315731 (8th Cir. Nov. 4, 1992).

In direct conflict with the Fourth Circuit, the Seventh Circuit employed constitutionally flawed state post-verdict review criteria that were not submitted to the jury through instructions. Rather than remand to the federal district court for a new trial as in *Hugo's Skateway*, 974 F.2d at 1418, the Seventh Circuit usurped the function of the jury in contravention of Black & Decker's Seventh Amendment rights by making findings of fact pursuant to state-law criteria never considered by the jury.

The Seventh Circuit's ruling implicitly is aligned with the rulings of several other federal circuits holding that

post-verdict appellate review of elements of a punitive damage award not considered by the jury is constitutionally appropriate under the Seventh Amendment. In *Estes v. Time Insurance Company*, No. 91-2809, 1992 WL 353272 at *8 (8th Cir. Dec. 3, 1992), for example, the court expressly rejected the argument that a federal court sitting in diversity is bound by the Seventh Amendment to instruct the jury on the totality of a state's punitive damage scheme. Rather, the court rejected the holding of *Mattison* as a "curious one." *Id.* (citing *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, No. 91-3717, 1992 WL 333575 (8th Cir. Nov. 18, 1992)). Similarly, the Third Circuit, in rejecting *Mattison*, "agree[s] with the holding in *Glasscock*, 946 F.2d at 1098-99, a diversity case involving Texas law, that federal post-trial review under Rules 50 and 59 and federal appellate review of a jury award provide sufficient constraint on a jury's discretion to satisfy the requirements of due process." *Dunn v. Hovic*, No. 91-3837, 1992 WL 228875 at *15 (3rd Cir. Sept. 18, 1992), *reh'g granted and opinion vacated* (3rd Cir. Oct. 8, 1992). *Cf. Morgan v. Woessner*, 975 F.2d 629, 640 (9th Cir. 1992) (rejecting arguments that *Haslip* changes the mandated *Browning-Ferris* review standard for federal punitive damages claims under 42 U.S.C. Section 1983 but has not considered *Haslip*'s effect on state-based punitive damage claims).

The Seventh Circuit's decision approving the District Court's failure to allow the federal jury to make full findings of fact in accordance with Illinois state law irreconcilably conflicts with the Fourth Circuit's approach as articulated in *Hugo's Skateway*, 974 F.2d at 1416-17. As a result of this circuit conflict, federal courts are left without guidance as to the appropriate manner for reviewing punitive damages awards in diversity actions so as not to violate *Haslip*, *Erie*, and Seventh Amendment guarantees. Review by this Court is merited to resolve this conflict among the federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 23, 1992

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 91-2670

JERRY L. ROSS,
Plaintiff-Appellee,

v.

BLACK & DECKER, INCORPORATED, a foreign corporation,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 4439—George M. Marovich, *Judge.*

ARGUED FEBRUARY 20, 1992—DECIDED OCTOBER 21, 1992

Before CUDAHY and COFFEY, *Circuit Judges*, and WOOD, JR., *Senior Circuit Judge.*

COFFEY, *Circuit Judge.* In July 1990, Jerry L. Ross, an Illinois resident, filed a products liability suit in an Illinois state court against the defendant Black & Decker, Inc. ("B & D"), a corporation with its principal place of business in Maryland. Ross sought damages for an injury sustained while operating a power saw manufactured by the defendant. B & D removed the state action to federal district court pursuant to 28 U.S.C. § 1441(a),

invoking the court's diversity jurisdiction. A jury found B & D liable for Ross' injury, and awarded him $2,000,000 in compensatory damages and $10,000,000 in punitive damages. B & D urges reversal of the jury verdict and damages award on numerous grounds. The parties agree that Illinois law is the substantive law governing this case. We affirm the jury's finding of liability against B & D and its award of $2,000,000 in compensatory damages to Ross, and vacate the jury's punitive damages award as excessive.

I. Factual Background

On May 4, 1983, Ross, a brick-layer and part-time handyman, was using a DeWalt 10 inch Power Miter Box electrical saw designed, manufactured and sold by B & D, to cut a piece of wood for window trim. Ross had placed the lumber on the floor to make a right-handed 45 degree cut. Ross used his right hand to operate the saw's trigger handle while holding the piece of wood with his left hand. A stationary metal enclosure prevented inadvertent contact with the upper portion of the saw blade. A clear plastic guard extending down along and parallel to the left side of the saw prevented contact with the blade on the left side position, and moved upward when it came in contact with the wood. The lower right side of the saw blade was barren of any such safety device. Because the saw had its own base on which to place the wood to be cut, it could be used on the floor as well as on a table. The saw could also be operated with either hand on the trigger handle while using the other hand to secure the workpiece.

After Ross finished making his cut, he released the saw's power trigger with his right and reached for the piece of wood with his left hand. He testified that as he "started to get up, my [left] hand rolled, I guess, or drifted into the blade." According to Dr. Eloff Eriksson, the plastic surgeon who later operated on Ross, the contact with the still-rotating blades "almost completely

severed [Ross' left] hand from the forearm at the level of the wrist." Only a narrow "skin bridge" and three tendons remained connecting the forearm to the hand. Dr. Eriksson stated that "all function in the hand [was] lost and the hand was dangling on that strip of skin and three tendons. . . . Functionally, this injury was essentially the same as a complete amputation because the majority of the structures were divided . . . ." Dr. Eriksson realigned the bones in Ross' injured hand by driving pins through the bones and into the forearm, and surgically repaired the severed tendons. With the use of microsurgical instruments he was able to re-attach and re-activate the severed blood vessels and nerves. A nerve from Ross' lower leg was removed and grafted into a missing gap in the median nerve of his left hand. After surgery, Ross underwent a course of rehabilitation therapy which lasted more than a year.

An expert witness for the plaintiff, Dr. Hatem Galal, a plastic surgeon who examined Ross' injured hand and conducted an occupational therapy evaluation of Ross' hand function for employment purposes, testified that Ross lost about 60% of the functioning of his left hand because of the saw accident and stated that a human hand accounts for about 90% of the function of an arm. An arm accounts for about 60% of the body's total function.[1] Therefore, Dr. Galal estimated that Ross' hand injury deprived him of about 30% of total body functioning. Ross testified that he is unable to return to work as a brick-layer because of the injury.

II. Post-trial Motions

B & D challenges the district court's denial of its post-trial motions for judgment notwithstanding the verdict ("JNOV") pursuant to Fed. R. Civ. P. 50(b) and for a

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[1] These percentages correspond with statistics from the American Medical Association's Guides to the Evaluation of Permanent Impairment at 16 (3rd Ed. 1990).

new trial pursuant to Fed. R. Civ. P. 59. "In diversity cases, state law governs the standard of review of a denial of a motion for judgment notwithstanding the verdict." *Bilski v. Scientific Atlanta*, 964 F.2d 697, 699 n.2 (7th Cir. 1992) (citation omitted); *see also Arcor, Inc. v. Textron, Inc.*, 960 F.2d 710, 714 (7th Cir. 1992). "In a diversity action governed by Illinois law, judgment notwithstanding the verdict is appropriate only in those cases in which all of the evidence, when viewed in the light most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Bilski*, 964 F.2d at 699 (citations omitted); *Arcor*, 960 F.2d at 714. We review denials of JNOV motions *de novo*. *Fleming v. County of Kane*, 898 F.2d 553, 559 (7th Cir. 1990).

Federal law governs the review of a motion for a new trial, even in diversity cases. *Hardin, Rodriguez & Boivin Anesthesiologists v. Paradigm Insurance Company*, 962 F.2d 628, 640 (7th Cir. 1992). A new trial may be granted only if the jury's verdict is against the clear weight of the evidence. *Id.* We review a denial of a motion for a new trial under the deferential abuse of discretion standard. *Id.*; *Bilski*, 964 F.2d at 700.

With these standards of review in mind, we turn to the substantive law governing Ross' claim. In Illinois, to prevail in a product liability action, a plaintiff must demonstrate that (1) his injury resulted from the condition of the product; (2) the condition of the product was unreasonably dangerous; (3) the condition existed when it left the seller's control; and (4) the condition was the proximate cause of the injury. *Bilski*, 964 F.2d at 699 (citing *Pierce v. Hobart Corp.*, 512 N.E.2d 14, 16 (1987)); *see also Aetna Insurance Co. v. Amilio Brothers Meat Co.*, 538 N.E.2d 707 (Ill. App. 1989).

At trial, Ross argued that the B & D saw, as designed, manufactured and sold, was unreasonably dangerous because it lacked a necessary lower right side saw blade

guard. On appeal, B & D makes one argument in support of its JNOV and new trial motions; that Ross failed to present any evidence supporting his theory that a right lower blade guard would have prevented his injury. B & D's trial strategy, which they now restate on appeal, was to argue that Ross' hand contacted the blade from *below*, and therefore a *side* right guard would not have prevented the injury. In partial support of its theory, B & D points out that Ross was unable to recollect precisely how his hand came in contact with the saw blade. Ross remembered only releasing the saw's power button, reaching with his left hand for the piece of cut lumber to the right of the saw, and his hand somehow "drift[ing]" into the blade. B & D also points to the testimony of John L. Bennett, a retired 40-year employee of B & D who last served with the company as a safety assurance manager. In this capacity, one of Bennett's functions was to serve as an expert witness for B & D. According to Bennett, a lower right guard on the saw would not have prevented Ross' injury because Ross came into contact with the saw from below, and the guard would only have prevented contact with the saw from the side. Bennett came to this conclusion based upon his analysis of photographs of Ross' injured hand, and from his inspection of the saw's mechanism.

The plaintiff disputed the deefndant's explanation for the injury, and argued that his left hand contacted the blade laterally from the right side of the saw and thus a lower-right blade guard would have prevented the injury. In support of his position, the plaintiff directs us to the testimony of Dr. Eriksson, who agreed that Ross' injury was consistent "with contact with a rotating saw blade with the thumb in an upward position and thereafter a rotation of the arm consistent with the grabbing of the saw blade resulting in the almost complete amputation, leaving only the skin bridge on top of the wrist". This factual scenario describes Ross' contact wth the saw blade from the right side of the machine, rather than from under the saw. Donald L. Clark, a mechanical engi-

neer formerly employed by B & D and one of the holders of the patent for the power miter saw which injured Ross, stated that he believed Ross' "left hand moved sideways into the still spinning blade." Another of the plaintiff's expert witnesses was Stanley R. Kalin, a safety engineer and former deputy chief of the office of training and development at the Department of Labor's Occupational Safety and Health Administration in Washington, D.C. Kalin explained that safety engineers specialize in "examining accidents and examining machines and processes and products to determine whether there is an unreasonable danger in the machine or in the process." In Kalin's opinion, the saw used by Ross "was defective and unreasonably dangerous due to the lack of a complete guard on the right-hand side of the blade" and that "the presence of a proper guard on the right-hand side of the blade would have prevented the injury to Mr. Ross."

The jury was thus presented with conflicting testimony as to how Ross' left hand came in contact with the blade. The defendant's witnesses maintained that contact was from below and therefore a right side guard would not have prevented the injury. The plaintiff's witnesses testified that the hand contacted the saw laterally and that a side guard would have spared Ross the injury. Given this conflicting testimony, the district court properly denied the defendant's motions for JNOV and for a new trial. B & D has merely demonstrated that the defendant's and plaintiff's experts disagreed about the way in which Ross suffered the serious and crippling injury to his left hand. The jury chose to believe the plaintiff's witnesses. As such, B & D has not met the standard required for a JNOV: that when viewing *the evidence in the light most favorable to Ross*, the evidence so overwhelmingly supported B & D's position that the liability verdict against B & D cannot stand. *See Bilski*, 964 F.2d at 699. Nor has B & D met the standard for a new trial: it has failed to demonstrate that the district court abused its discretion in concluding that the verdict was against

the clear weight of the evidence. *See Harding*, 962 F.2d at 640. The defendant's JNOV and new trial motions were properly denied.

III.

B & D argues that the district court comitted several evidentiary errors which require reversal of the jury verdict. "Even in diversity cases the rules of evidence applied in federal courts are the federal rules of evidence rather than state rules . . ., save with respect to matters of presumptions, privilege, and competency of witnesses, Fed. R. Evid. 302, 501, 601, none of which is involved here." *Barron v. Ford Motor Company of Canada*, 965 F.2d 195, 198-99 (7th Cir. 1992). We note that the Illinois Supreme Court has selectively adopted a large number of the Federal Rules of Evidence by decision and court rule. Michael H. Graham, *Cleary & Graham's Handbook of Illinois Evidence* xxxii (5th ed. 1990). The appellant carries a heavy burden in challenging a trial court's evidentiary rulings on appeal because a reviewing court gives special deference to the evidentiary rulings of the trial court. *Wheeler v. Sims*, 951 F.2d 796, 801-02 (7th Cir. 1992), *cert. denied*, 1992 WL 130799 (U.S. October 13, 1992) (citation omitted). We will reverse such rulings only upon a showing that the trial court committed an abuse of discretion. *Id.* at 802. Moreover,

> "[u]nder the abuse of discretion standard of review, the relevant inquiry is not how the reviewing judges would have ruled if they had been considering the case in the first place. . . . Rather, the abuse of discretion standard is met only when the trial judge's decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based that decision, or where the supposed facts found are clearly erroneous."

Id. Our review is limited under Fed. R. Civ. P. 61 to whether an "error in either the admission or the exclu-

sion of evidence was made which affected the substantial rights" of the defendant. *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1266 (7th Cir. 1988). With this highly deferential standard of review in mind, we turn to the specific court rulings challenged by the defendant.

A.

B & D argues that the district court abused its discretion when it permitted Ross to introduce evidence concerning an Underwriters Laboratory ("UL") safety standard, made effective in 1982, which required a lower right blade guard on power saws such as the one involved in the instant case. UL is an independent, not-for-profit organization which tests products and formulates safety standards which it then publishes. "Under both federal and Illinois law, compliance with applicable federal [safety] standards is relevant, though not conclusive, in a products liability case." *Schwartz v. American Honda Motor Company*, 710 F.2d 378, 383 (7th Cir. 1983). Moreover, we note that under Illinois law, "evidence of standards may be relevant and admissible even though the standards have not been imposed by statute or promulgated by a regulatory body and therefore do not have the force of law." *Ruffiner v. Material Service Corporation*, 506 N.E.2d 581, 584 (Ill. 1987). In product liability actions such as the instant one, standards may be relevant in determining whether or not the condition of the product is unreasonably dangerous. *Id.*

Nevertheless, B & D maintains that the UL safety standard should not have been admitted into evidence because it became effective after the saw was manufactured. In support of this argument, B & D relies principally on an Illinois case, *Murphy v. Messerschmidt*, 368 N.E.2d 1299 (Ill. 1977). In *Murphy*, the Illinois Supreme Court considered the admissibility of a building code adopted by a city ordinance in 1963 in a case involving the safety of an apartment building's steps which were

constructed in 1952. *Id.* at 1302. The court ruled that the building code was inadmissible because it was not "relevant in terms of both time and conduct involved." *Id.* B & D maintains that *Murphy* established a blanket rule that safety standards adopted after the manufacture of a product are not admissible in product liability actions. We disagree. *Murphy* itself acknowledged that there were instances in which post-manufacture safety standards were relevant, for example when the plaintiff could show that a safety regulation was "designed to eliminate existing hazards as well as to prevent the creation of future ones." *Id.* Moreover, as the district court noted, *Murphy* was not a products liability case, but a negligence case. The focus in a products liability case, the district court pointed out, is on the "unreasonable dangerousness of the product. We are dealing with the relevancy of subsequent standards on the issue of 'unreasonably dangerous.' The fact that the standards were promulgated subsequent to manufacture goes to the weight and not to admissibility." We agree with the district court's reasoning, and refuse to hold that the court abused its discretion in admitting in evidence the 1982 UL safety standard as evidence of whether the power saw was unreasonably dangerous when manufactured. *See also Jones v. Black & Decker Manufacturing Company*, 559 N.E.2d 1004, 1005 (Ill. App. 1990) (in a wrongful death/products liability action, federal mining regulations which became effective after the manufacture of a wrench were relevant to the question whether the wrench was unreasonably dangerous); *Seward v. Griffen*, 452 N.E.2d 558, 568 (Ill. App. 1988) (federal safety standards which became effective after the manufacture of a van were relevant to the question whether the van was unreasonably dangerous).

B.

B & D also argues that the district court erred in allowing evidence that B & D added a right lower blade guard to its saw once UL safety standards required it. Fed. R. Evid. 407 provides that:

> "[w]hen, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."

Thus, under Rule 407, post-manufacture remedial measures are admissible if the manufacturer disputes the feasibility of the remedial measures. *Probus v. K-Mart, Inc.*, 794 F.2d 1207, 1210 (7th Cir. 1986); *Flaminio v. Honda Motor Company*, 733 F.2d 463, 468 (7th Cir. 1984). B & D claims it admitted the feasibility of the remedial measures it later took. It did not. The alleged "admission" occurred during adverse examination by the plaintiff of the defendant's expert *after* evidence of the subsequent remedial measure had been introduced by the plaintiff. B & D claims that it did not have an opportunity to admit feasibility until it presented its case, but we reject this argument. The defendant could have stipulated to the feasibility, or included the admission as an uncontested fact in the pretrial memorandum submitted by the parties, or in a pretrial motion accompanying the submission of the memorandum. It did not, nor did it make any objection when the district court ruled that the post-remedial measures would be admitted because the defendant contested feasibility. Because B & D made what has evolved into a tactical trial error by not stipulating to feasibility, this ruling was proper.

C.

B & D also argues that the district court erred in allowing Ross to introduce evidence of two other accidents involving the defendant's power saw which occurred after Ross' accident. "Evidence of other accidents in products liability cases is relevant to show notice to the defendant of the danger, to show existence of the danger, and to show the cause of the accident." *Nachtsheim*, 847 F.2d at 1268. "However, before such evidence will be admitted, the proponent must show that the other accidents occurred under *substantially similar circumstances.*" *Id.* The admission of such evidence lies within the sound discretion of the trial judge. *Id.* at 1269. We have reviewed the testimony relating to these two accidents and conclude that the circumstances surrounding the accidents were substantially similar to Ross'. Both involved hand injuries sustained while using the B & D power miter saw model involved in the instant case. We agree with the district court's ruling that Ross established that the other accidents were sufficiently similar to his to qualify for admission. B & D also argues, without citation to any authority, that evidence of the two accidents should have been excluded because they occurred after Ross' injury. We reject this argument as well. The fact that the accidents occured after Ross' injury does not make evidence concerning them any less probative of the unreasonably dangerous design and condition of the saw or of the cause of the accident. *Nachtsheim*, 847 F.2d at 1268.

IV.

B & D argues that the district court erred in quashing the discovery deposition of Robert Ruth, a former B & D employee who supervised the design of the power saw prototype for mass production. "Our standard of review for the district court's decision not to allow additional pretrial discovery is abuse of discretion." *Olive Can Co., Inc. v. Martin*, 906 F.2d 1147, 1152 (7th Cir. 1990).

Only six days before the trial was scheduled to begin and two months after discovery had been closed, B & D sent a notice to Ross of its intention to depose Ruth. The deposition was scheduled to be held in Pennsylvania because Ruth was suffering from cancer and was unable to travel to Chicago from his home in Pennsylvania. The defendant asserted that Ruth would contradict the expected testimony of Clark, the former B & D mechanical engineer who headed the team of engineers designing the saw. Clark would testify that he advised Ruth, his superior at B & D, of the need for a lower right blade guard, but Ruth refused to allow him sufficient time to design a guard which would not reduce the saw's versatility.

The district court quashed the notice of deposition of Ruth. The court explained its decision in its order denying the defendant's post-trial motion:

> "defendant contends that it was unaware of the whereabouts of Robert Ruth until a few days before trial and that the court therefore should have permitted defendant to take his evidence deposition for use during trial. Robert Ruth was no stranger to defendant. He had been a high-level Black and Decker employee. He was on the patent for the power miter box saw at issue in this case. He was a retiree of the company to whom Black & Decker was presumably sending retirement checks. He was mentioned in the deposition of plaintiff's safety expert, Mr. Clark, at least 60 days before trial. The court believes that it is much more likely that . . . defendant felt that Mr. Ruth was not needed as a witness. Defendant's contention that Ruth's whereabouts were unknown to Black and Decker until a few days before trial is incredible. The court stands by its refusal to let defendant take Mr. Ruth's evidence deposition a few days before trial."

After the court's refusal to allow the evidence deposition of Ruth, B & D informed the court that it could arrange

to have Ruth's testimony broadcast live during trial over closed circuit television in a location a few blocks from the courthouse. This would have involved moving the trial to an undisclosed location in order to watch Ruth's testimony. In its ruling from the bench rejecting this proposal, the court stated, "I think by doing it this way [through closed circuit television at the undisclosed location] and highlighting his testimony would be awarding [B & D] for its lack of diligence, and it would be prejudicing the plaintiff . . . ."

The district court did not err in quashing Ruth's discovery deposition or in refusing to allow his testimony via closed circuit television at a location removed from the courthouse. As the district court explained, the defendant's attorney created the problem through his lack of diligence in failing to obtain Ruth's deposition in a timely fashion. Ruth was obviously well-known to the defendant and its attorney. The failure to obtain Ruth's deposition in a timely manner should not have been rewarded by allowing Ruth to deliver his testimony through closed-circuit television at a location removed from the scene of the trial. The district court did not abuse its discretion in quashing Ruth's discovery deposition or in refusing to make extraordinary special arrangements for his testimony.

V.

B & D objects to the district court's decision to allow the plaintiff to read excerpts of the testimony of a B & D employee, William F. Saffell, from another trial. Under Fed. R. Evid. 804(b)(1), if a witness is unavailable, his testimony "given as a witness at another hearing of . . . a different proceeding" may be admitted "if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination."

B & D objected to the proposed Saffell testimony as cumulative and refused to produce its employee. Ross asserts that Saffell was not subject to the court's subpoena power because he resided outside the state of Illinois, and B & D does not contest that assertion. Ross therefore moved for permission to read Saffell's testimony from another trial to the jury, and the district court granted the motion. B & D objected, arguing that it would have produced the witness had the trial court so ordered.

B & D claims that the district court erred because it was unable to object to the testimony read by Ross' counsel and was thus prevented from "providing a full background and explanation of the circumstances surrounding [Saffell's] testimony, or from offering rebuttal testimony." We reject this contention. B & D could have called Saffell, a B & D employee, as its own witness in order to make any point about, or contradict or put into question, any of the testimony that had been read by Ross' counsel. It did not, and cannot now be heard to claim that the district court's decision to allow the testimony was reversible error.

VI.

B & D also argues that the jury verdict should be reversed because the trial judge acted as an advocate for the plaintiff when he sought to clarify a witness' testimony. The argument is preposterous. Under Fed. R. Evid. 614(b), a district court may interrogate a witness. The advisory notes to this provision state that a judge abuses his authority to question a witness when "the judge abandons his proper role, and assumes that of an advocate . . . ." The alleged impermissible conduct by the trial judge occurred during B & D's cross examination of its former employee Clark. B & D attempted to introduce as evidence a portion of Clark's deposition testimony which it alleges impeached the witness. In his deposition, read by B & D's attorney at trial, Clark recalled his former super-

visor Ruth saying that if the guard was not developed "in the neighborhood of four weeks" "we were going to stop development and release it and go into production without the lower right side blade guard." Apparently, B & D was attempting to demonstrate that this conversation could not have taken place because Ruth had left the company the year before the saw went into mass production. B & D argues, that according to Clark's deposition testimony, the saw went into mass production immediately after the four-week period Clark was given to re-design the product. However, the deposition transcript reflects that Clark merely stated that the product would be "release[d]" to go into production, not that production would begin immediately. Clark's trial testimony demonstrates that his recollection was that the process culminating in mass production would begin at the end of the four-week period, not mass production itself. When B & D's counsel asked him "[s]o what I'm trying to determine, sir, in that four-week period when it ended, culminated in mass production, in the real production run?", Clark answered, "[i]t allowed it to progress so that we did *eventually end up with mass production. There was a lot of other steps that had to be made.*" (emphasis added).

Ross' counsel objected to B & D's attempt to impeach. The district court indicated its agreement with Ross' objection, and then sought a clarification of Clark's testimony. The district court asked the witness, "[t]he inference isn't that he [Ruth] said that, okay, you got until June the 1st of 1974 to do this and on July the 1st of 1974 you start mass producing that thing. That was not the case, was it, sir?" The witness agreed with the court's characterization of his testimony.

A trial judge may not advocate on behalf of a plaintiff or a defendant, nor may he betray even a hint of favoritism toward either side. This scrupulous impartiality is not inconsistent with asking a question of a witness in an effort to make the testimony crystal clear for the jury.

The trial judge need not sit on the bench like a mummy when his intervention would serve to clarify an issue for the jurors. The brief, impartial questioning of the witness by the judge, as the record reflects, to make the witness' testimony clearer was entirely proper, and B & D's assertion that the judge assumed the role of an advocate in this exchange is without merit.

VII. Punitive Damages

B & D also challenges the jury's award of punitive damages, arguing that they should not have been allowed and, in the alternative, that the jury's award of $10,000,000 in punitive damages was excessive. We will address each argument separately.

A.

In a diversity action, state law determines whether punitive damages are appropriate. *West v. Western Casualty and Surety Company*, 846 F.2d 387, 398 (7th Cir. 1988). Under Illinois law, "whether the circumstances in a particular case may justify an award of punitive damages is a question of law." *J.I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc.*, 516 N.E.2d 260, 263 (Ill. 1987). In Illinois, punitive damages may be awarded when the defendant acted "with fraud, actual malice, deliberate violence or oppression, or when the defendant act[ed] willfully, or with such gross negligence as to indicate a wanton disregard for the rights of others". *Id.*; *Loitz v. Remington Arms Company, Inc.*, 563 N.E.2d 397, 402 (Ill. 1990) (citation omitted). "A defendant is guilty of willful and wanton conduct when he demonstrates knowledge that his conduct poses an increased risk of serious physical harm to another." *Huelemann v. Berkowitz*, 568 N.E.2d 1373, 1378 (Ill. App. 1991). In the product liability context, punitive damages are appropriate if "the manufacturer's conduct evinced a flagrant disregard for public safety." *J.I. Case*, 516 N.E.2d at 263. *See also Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 467 (Wis.

1980) (Coffey, J., dissenting) (punitive damages are reserved for torts which "are malicious, outrageous or a wanton disregard of personal rights which require the added sanction of a punitive damage to deter others from committing acts against human dignity") (applying Wisconsin law) (citation omitted).

Ross argues that he demonstrated at trial that B & D's decision to manufacture and sell its saw without a lower right blade guard was in flagrant disregard of the safety of the public. Ross stresses the testimony of Clark, the former B & D mechanical engineer who oversaw the design and development of the prototype for the miter box saw. Clark testified that B & D knew that potential users of the saw were just as likely to secure a piece of lumber by placing their hand on the right as well as the left side of the saw's blade, thus making blade guards necessary on both the right and left sides of the lower blade. However, according to Clark, B & D officials refused to install a right lower blade guard in the saw's design because it would have limited the saw's ability to make certain kinds of cuts, thus diminishing the product's versatility and marketability. Clark testified that he had warned against producing the saw without the right lower blade guard, but was given too short a period of time to re-design the saw.[2] Clark stated that had he "been given enough time, I'm certain I could have come up" with a guard that would have protected its user and not diminished the saw's versatility. Impatient B & D officials, however, ordered him to proceed with the saw's development without the right lower blade guard. Clark described the saw that B & D eventually manufactured and sold as "unsafe and unreasonably dangerous" because of the lack of the lower right blade guard.

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[2] The purpose of this attempted redesign was to create a right lower blade guard that would not diminish the saw's versatility.

Ross also cites B & D's correspondence with UL[3] concerning the saw which injured Ross as further evidence that the defendant acted with flagrant disregard for the safety of the public. B & D policy requires that all its products meet UL standards. In July 1978, when the B & D saw which injured Ross was manufactured, no UL standards were in place that dealt specifically with power miter saws. In October, 1979, however, UL circulated to the manufacturers of power miter saws a proposed new standard requiring right and left lower guards. During the next fourteen months, B & D officials corresponded with UL officials in an attempt to persuade them that a lower right blade saw guard was not necessary. In an October 14, 1980 letter, for example, B & D officials argued that the saw's motor blocked visibility from the right side, making it unlikely that a user would attempt to secure the workpiece from the right side of the blade. UL officials responded that, based on their tests of the product, the motor did not sufficiently block visibility to prevent a user from attempting such cuts. In 1982, UL officially adopted the requirement of a lower right side blade guard. Soon after, B & D, in accordance with its policy of adhering to UL standards, was manufacturing its power miter saws with the lower right guard. Ross maintains that this correspondence with UL provides further evidence that B & D knew or had reason to know that its saw was unreasonably dangerous but resisted adding the lower right guard until it was in violation of UL's published standards. Since products that do not meet UL standards are at a competitive disadvantage, Ross maintains that the delay in B & D's re-design of the saw demonstrates that it was concerned with profits only, and not safety.

From our review of the record we are of the opinion that the Clark testimony and the UL correspondence were

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[3] As we noted above, UL is an independent organization which promulgates product safety standards.

sufficient to support a judgment that B & D's conduct evinced a flagrant disregard for public safety; thus the jury's award of punitive damages was proper. *J.I. Case*, 516 N.E.2d at 263. Despite internal warnings from Clark about the unreasonably dangerous condition of their saw, B & D officials decided to push ahead with production without a lower right blade guard and refused to grant Clark sufficient time to develop a versatile *and* safe design. B & D continued to manufacture the saw without the right blade guard in the face of the obvious view of the UL safety experts that a lower blade guard on the right side was needed. "Where punitive damages may be assessed, they are allowed in the nature of punishment and as a warning and example to deter the defendant and others from committing like offenses in the future." *Loitz*, 563 N.E.2d at 402. An award of punitive damages in the instant case would properly serve such a deterrent purpose.

B.

B & D argues in the alternative that the $10,000,000 punitive damages award was excessive and asks this court to lower the level of punitive damages by ordering a remittitur. In a diversity action, "the factors a jury may consider in determining the amount of punitive damages are governed by state law." *Cash v. Beltmann North American Company, Inc.*, 900 F.2d 109, 110 (1990). Federal law, however, governs, the district court's review of the jury award and appellate review of the district court's decision. *Id.* We will review the district court's determination on the issue of the size of the jury verdict under an abuse of discretion standard. *Id.* When the district fails to apply the appropriate factors to exercise its discretion, an abuse of discretion can occur. *Id.* Three factors are especially relevant in analyzing the amount of punitive damages awards under Illinois law: "(1) the nature and enormity of the wrong, (2) the financial status of the defendant, and (3) the potential liability of the defendant resulting from multiple claims." *Hardin*, 962

F.2d at 640 (citing *Hazelwood v. Illinois Cent. Gulf R.R.*, 460 N.E.2d 1199, 1207-08 (1983)); *see also West*, 846 F.2d at 399. These three factors "are not, however, exhaustive. It is vital that each case be carefully assessed in light of the specific facts involved, and the ultimate determination should be governed by the circumstances of each particular case. Moreover, the underlying purpose of an award of punitive damages must be satisfied." *Deal v. Byford*, 537 N.E.2d 267, 272 (Ill. 1989). That purpose is "to punish the wrongdoer and to deter that party, and others from committing similar acts in the future. . . . Because of their penal nature, punitive damages are not favored in the law, and courts must be cautious in seeing that they are not improperly or unwisely awarded." *Id.*

The district court denied B & D's post-trial motion to remit a portion of the punitive damages award by stating that the award was not "excessive or unreasonable under the evidence." The district court provided no further explanation of its reasoning. In reviewing the district court's decision, we begin by analyzing the punitive damages award under the three factors set out by the Illinois Supreme Court in *Hazelwood*, 450 N.E.2d at 1207-08. As to the nature and enormity of the wrong, B & D's refusal to modify its design in the face of Clark's internal warnings and UL's proposed safety standard is the sort of behavior by a manufacturer that justifies a jury's imposition of an award of punitive damages. As to B & D's financial status, Ross introduced evidence that as of December 31, 1990, B & D had a net worth of $1,933,608,000 and that the company turned $51,095,000 in profits in 1990 from the sale of power tools. As to the third factor, B & D makes no claim that it may be subject to potential liability from multiple claims.

Nevertheless, focusing as we must on the particular circumstances of this case and keeping in mind that the purpose of punitive damages is to punish and deter, we conclude that the award of $10,000,000 is excessive and

that the district court judge abused his discretion in refusing to modify it. We reach this conclusion in part because the saw which injured the plaintiff was not in violation of any UL standards as of the date of its manufacture or its sale to the general public (although it was in violation on the day Ross was injured), and this fact should have been taken into consideration as mitigating somewhat the wrong committed by B & D. Moreover, because punitive damages are not favored in the law, we must ensure that their award serves the purposes for which they are designed. An award of $5,000,000, representing roughly ten percent of B & D's 1990 power tool profits, is sufficient to serve the twin purposes of punishment and deterrence. Under the factual situation set forth herein, that amount is sufficient to dissuade B & D from behaving in a like manner again and puts a sufficient dent in its profits to serve as a fitting punishment. We have the same power to issue a remittitur as the trial court, *Cash*, 900 F.2d at 112, and therefore, in addition to AFFIRMING the jury's finding of liability against the defendant and its award of $2,000,000 in compensatory damages, we VACATE the jury's award of punitive damages, and REMAND the case to the district court with directions to enter an order for a new trial on the issue of punitive damages, unless the plaintiff Ross accepts a remittitur of the punitive damages to $5,000,000.

REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT
ILLINOIS, EASTERN DIVISION

No. 90 C 4439

ROSS

v.

BLACK AND DECKER, INC.

[June 17, 1991]

ORDER

This products liability case was tried before a jury which returned a verdict in plaintiff's favor in the amount of $2,000,000 in compensatory damages and $10,000,000 in punitive damages. This court entered judgment on that verdict. Before the court are defendant Black and Decker's motions for a judgment notwithstanding the verdict and, in the alternative, for a new trial.

Fed. R. Civ. P. 50(b) provides in relevant part:

> Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have to verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict. . .

Fed. R. Civ. P. 59(a)(1) provides in relevant part: "A new trial may be granted . . . on all or part of the issues [heard by a jury] for any of the reasons for which new trial have heretofore been granted in actions at law. . ."

In diversity cases, the disposition of a JNOV motion is governed by state law. *F. W. Hempel & Co. v. Metal World, Inc.*, 721 F.2d 610, 613 (7th Cir. 1983). Under Illinois law, a JNOV motion should be granted "only in those cases, in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [the] movant that no contrary verdict based on that evidence could ever stand." *Pedrick v. Peoria & Eastern Railroad Co.*, 37 Ill. 2d 494, 229 N.E.2d 504, 513-514 (1967). The standard for granting a new trial motion is that the jury's verdict "is against the clear weight of the evidence." *First National Bank of Kenosha v. United States*, 763 F.2d 891, 896 (7th Cir. 1985).

Defendant's trial strategy was to make this a single issue case. It was defendant's contention that the plaintiff brought his hand straight up underneath into the blade of its power miter box saw and thus, that plaintiff's injury would not have been prevented by a right lower blade guard. Both sides presented evidence on this issue and the plaintiff prevailed. The court finds that the jury's conclusion on this issue, far from being against the clear weight of the evidence (much less a verdict which cannot stand on the basis of all the evidence), is very well-founded in the evidence.

The clear weight of the evidence established that defendant's power miter box saw was unreasonably dangerous and unsafe when put to a reasonable and foreseeable use when considering its nature and function. The clear weight of the evidence also established that the power miter box saw was the proximate cause of the plaintiff's injuries. The clear weight of the evidence also supports a verdict of punitive damages. Neither the verdict of the jury as to general damages or punitive damages are excessive or unreasonable under the evidence.

With respect to the numerous arguments made by defendant to the contrary, the court deems them all to be

meritless and, with one exception, worthy of no further discussion. Defendant contends that it was unaware of the whereabouts of Robert Ruth until a few days before trial and that the court therefore should have permitted defendant to take his evidence deposition for use during trial. Robert Ruth was no stranger to defendant. He had been a high-level Black and Decker employee. He was on the patent for the power miter box saw at issue in this case. He was a retiree of the company to whom Black & Decker was presumably sending retirement checks. He was mentioned in the deposition of plaintiff's safety expert, Mr. Clark, at least 60 days before trial. The court believes that it is much more likely that, given its plaintiff stuck-his-hand-under-the-blade defense, defendant felt that Mr. Ruth was not needed as a witness. Defendant's contention that Ruth's whereabouts were unknown to Black and Decker until a few days before trial is incredible. The court stands by its refusal to let defendant take Mr. Ruth's evidence deposition a few days before trial.

Defendant's motions for a judgment notwithstanding the verdict and for a new trial are denied.

/s/ George M. Marovich
GEORGE M. MAROVICH
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

December 2, 1992

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. HARLINGTON WOOD, JR., Senior Circuit Judge

No. 91-2670

JERRY L. ROSS,
Plaintiff-Appellee,

v.

BLACK & DECKER, INCORPORATED, a foreign corporation,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

No. 90 C 4439

George M. Marovich, Judge

[Dec. 2, 1992]

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendant-appellant, no judge in active service

has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Supreme Court, U.S.
FILED
JAN 22 1993
OFFICE OF THE CLERK

No. 92-1082

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BLACK AND DECKER, INC.,

Petitioner,

v.

JERRY L. ROSS,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) Whether this Court should consider Petitioner's claims that it was denied due process or its right to trial by jury in the award of punitive damages where these issues were never raised before the District Court nor in Petitioner's briefs and argument before the Court of Appeals, but were raised for the first time in the Petition for Rehearing? Alternatively, whether this Court should consider Petitioner's newly-raised arguments despite the fact that they are directly contrary to the arguments Petitioner had previously advanced before both the District Court and the Court of Appeals?

2) Whether Petitioner was in fact denied its "due process rights" or its right to "trial by jury" where Petitioner admits that it agreed to the jury instructions which it now claims denied it these rights, where both the District Court and Court of Appeals in fact conducted the precise form of post-judgment review actually sought by Petitioner, and where the Court of Appeals granted a substantial remittitur of punitive damages despite Petitioner's explicit waiver of its request for a remittitur during argument?

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No. 92-1082

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BLACK AND DECKER, INC.,

Petitioner,

v.

JERRY L. ROSS,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully submits this brief in opposition to the Petition for a Writ of Certiorari in this case and asks that the Petition be denied.

STATEMENT OF THE CASE

Petitioner, Black & Decker, begins its request for certiorari by melodramatically proclaiming that "this case presents another instance of punitive damages 'run wild' ", and then suggests that review of the opinion below is warranted because of what Black & Decker characterizes as an "existing conflict among the federal circuits regarding the application of *Haslip* [*Pacific Mutual Life Insurance Company* v. *Haslip*, 111 S.Ct. 1032 (1991)]." (Pet. 2-3)

This claim is truly remarkable—but only because it represents a complete lack of candor in its presentation to this Court. The issues which Black & Decker raises in its petition were never raised before the District Court. They were never raised in briefs or oral argument before the Court of Appeals. They were raised for the first time in the Petition for Rehearing Black & Decker filed in the Seventh Circuit, but then only after an explicit waiver of these issues by its counsel before that Court during oral argument!

Black & Decker is well aware that the question of the timeliness of these arguments is very much an issue in this case. This question was discussed in detail in the Answer to the Petition for Rehearing filed in the Court of Appeals. Any forthright and candid request for review before this Court should therefore have addressed the timeliness of these arguments as a threshold consideration. Failing that, it could be expected that any party that felt free enough to levy such bitter criticism against the trial and reviewing courts for "ignoring" a decision of this Court would have at least tempered some of that criticism

by conceding that it had raised entirely different arguments below and that it had failed to raise these arguments until after both the lower courts had announced their rulings. Indeed, since the decisions of this Court which Petitioner relies upon note that the issue of timeliness is a necessary foundation for raising these particular issues, Black & Decker's failure to even acknowledge this issue in its Petition is especially disturbing.

This Court has admonished litigants who seek to attack an award of punitive damages on these grounds that it will not consider these issues where they are raised in a belated fashion. In *Browning-Ferris Industries* v. *Kelco*, 109 S.Ct. 2909 (1989), this Court declined to consider the question of whether the "size of the [punitive] damages award" violated the constitutional constraints:

> "[b]ecause petitioners failed to raise their due process argument before either the District Court or the Court of Appeals, and made no specific mention of it in their petition for certiorari in this Court." (109 S.Ct. at 2921.)

The Court stated that it would not "attempt to decide the question in the absence of a record on the due process point developed in the District Court and the Court of Appeals." (109 S.Ct. at 2921, fn. 23.) This admonition was repeated in *Haslip*, where the Court said that it would decline to consider these issues when they were "tardily raised." (111 S.Ct. at 1040.) Despite the absence of any such record "developed" below, and despite the fact that these issues were clearly "tardily raised" in this case, Black & Decker blithely presents these same arguments without bothering to address this threshold consideration.

The question of whether these issues *had* been properly preserved for review under the test adopted in *Browning-Ferris* and *Haslip* was hotly contested before the Court of Appeals on Rehearing. Moreover, Black & Decker tacitly

admitted that there was at least a question as to whether these arguments had been preserved when it suggested in its Reply to the Answer to the Petition for Rehearing that the Court of Appeals could consider these issues as "plain error" where they were "voiced for the first time at the appellate level." (Reply, 4) Thus, in light of the express statements by this Court in *Browning-Ferris* and in *Haslip* that it would not consider these issues when they were "tardily raised", the question of whether these issues *had* been preserved for review by this Court *could* and *should* have been addressed by Black & Decker at some point in its request for certiorari. Instead, Black & Decker chose to remain silent on this critical issue, preferring instead to do what it did before the Court of Appeals, reserve its real arguments for its Reply Brief in a rather transparent effort to deny plaintiff the right to fairly address the real issues in this case.

Plaintiff therefore respectfully submits that it is clear that Black & Decker believes that due process is a one-way street. Rather than accord plaintiff the right to "due process" by discussing or even acknowledging the existence of this critical, threshold issue in its Petition for Certiorari, so plaintiff could address that question in his Brief in Opposition, Black & Decker has chosen to pretend that this question simply does not exist. By doing so, it hopes that this Court will give a broad interpretation to its own Rule 15.6 and allow Black & Decker to "respond" to this matter in its Reply as an issue "first raised in the brief in opposition".

This type of tactical maneuvering and gamesmanship has characterized Black & Decker's approach throughout this litigation. This case is hardly an instance of "punitive damages run wild" as Black & Decker suggests. Instead, Black & Decker's defense of this case before both the District Court and the Court of Appeals reflected a coldly-calcu-

lated effort to deflect the attention of the jury, the trial court, and the reviewing court from the undeniable evidence of its willful misconduct by contesting the underlying liability issue only. That defense ignored the entire question of punitive damages, which Black & Decker knew would be more difficult to defend, in favor of what defendant hoped to be the more palatable claim that the accident itself had nothing to do with the alleged defect in its product.

In order to carry out this strategy, Black & Decker never raised any of the arguments which are now presented in the Petition for Certiorari until after this defense failed before the jury, before the District Court, and before the Court of Appeals. Then, and only at that time, did Black & Decker abandon its now-unsuccessful defense on proximate cause and turn to criticism of the trial and reviewing courts for "ignoring" Constitutional claims *that had never been previously raised*!

The fact that Black & Decker had chosen this rather unusual—and perhaps fool-hardy—proximate cause defense was recognized below. As the District Court noted in its opinion, defendant's trial strategy:

> "[w]as to make this a single issue case. It was defendant's contention that the plaintiff brought his hand straight up underneath into the blade of the power miter box saw and thus, that plaintiff's injury would not have been prevented by a right lower blade guard [the specific defect at issue in this case]. Both sides presented evidence on this issue and the plaintiff prevailed." (App. 23a)

Concentrating on its efforts to "make this a single issue case", and to deflect attention away from even the possibility of punitive damages, Black & Decker not only failed to raise any objections to the jury instructions which it now contests before this Court, but went so far as to *agree*

to the manner in which the jury was instructed on the question of punitive damages.[1]

Following this theme in its motion for judgment notwithstanding the verdict or for a new trial, Black & Decker devoted the majority of its arguments in those pleadings to an effort to convince the District Court that a new trial was warranted based on evidentiary rulings. There was no complaint raised as to the jury instructions in light of *Haslip*. No claim of "denial" of the right to "trial by jury" was raised in the post-judgment motions. Indeed, in its post-trial pleadings as well as in its briefs to the Court of Appeals, the *only* reference made to the award of punitive damages rested on the claim that the District Court was required to apply Illinois law in reviewing this issue. Black & Decker never asked the District Court to conduct what it now perceives as a "required" review under *Haslip*, never asked it to include any specific findings along that line in its memorandum opinion, nor did it suggest that the jury should have been allowed to carry out the "role" it now raises in its Petition.

This rather singular strategy continued before the Court of Appeals. Black & Decker did not present any of the arguments it now raises in its Petition in its briefs to the Court. Again, it focused almost exclusively on its "proximate cause" defense. This focus continued during oral argument. With the exception of a short time spent responding to questions, counsel for Black & Decker devoted the rest of his argument before the Court of Appeals to a in-court demonstration of how he believed the accident had occurred. Using this "show-and-tell" method, he tried to persuade the Court of Appeals that the guard which Black & Decker

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[1] Black & Decker concedes that it agreed to the jury instructions in issue here at footnote 2 on page 4 of its Petition.

failed to put on the product until several years later would not have prevented the injury to plaintiff. Counsel for Black & Decker then concluded that no damages—compensatory or punitive—were warranted.

During rebuttal, the Court specifically questioned counsel for Black & Decker as to whether Black & Decker was still seeking a reduction in the amount of punitive damages or whether Black & Decker was simply asking the Court to set aside the entire judgment based upon counsel's in-court demonstration of how he believed the accident occurred. Counsel for Black & Decker, remaining true to Black & Decker's "single issue" proximate cause defense, stated that Black & Decker was not seeking a reduction in the amount of punitive damages, but asked that Court to accept the in-court demonstration as a basis for setting aside the compensatory and punitive damage award in its entirety.

After the Court of Appeals published its opinion, Black & Decker recognized that its "single issue" defense had failed. It filed a Petition for Rehearing which requested review *in banc* of a decision which Black & Decker now criticized as "ignoring" Black & Decker's "due process" and Seventh Amendment rights, even though these issues were raised for the first time in that Petition.

Plaintiff respectfully submits the procedural history of Black & Decker's defense before the District Court and the Court of Appeals prior to the filing of its Petition for Rehearing demonstrates that the true issue in this case is not whether Black & Decker was denied its rights under our Constitution or even whether the decision of the Court of Appeals for the Seventh Circuit is "in conflict" with the decision of other Courts of Appeal interpreting the decision of this Court in *Haslip*. Plaintiff believes that the question that must be decided is whether it will serve

the ends of justice to accept review on behalf of a petitioner who defended this case throughout the proceedings below on purely factual grounds and decided to raise its due process and Seventh Amendment claims for the first time only after that defense failed. Should this Court grant this petitioner the privilege of review where the petitioner's criticism of the decisions below is based on a claim that the lower courts "ignored" allegations of error which this party never bothered to raise before those courts? Should this Court accept review based on a petition which rests almost entirely on a decision of this Court—*Haslip*—which explicitly states that the precise arguments raised in the petition will not be considered where they are "tardily raised" when these claims were clearly raised in a tardy fashion by the petitioner?

Plaintiff respectfully submits that the answer to both questions is the same—certiorari is inappropriate where a party chooses to defend a case on a basis which is quite distinct from and contrary to the "newly-discovered" arguments that it seeks to raise before this Court. If there is truly any deprivation of "due process" inherent in the theories presented by Black & Decker, it is the question of whether due process should be a one-way street rather than a concept which recognizes that justice must be applied in an even-handed fashion.

Black & Decker had every opportunity to present its due process and Seventh Amendment arguments before the District Court. The trial in this case took place several months after the widely-publicized decision of this Court in *Haslip*. Black & Decker then had every opportunity to raise the arguments it now seeks to present to this Court in the post-judgment proceedings before the District Court. It chose not to do so. It also had every opportunity to raise these matters before the Court of Appeals prior to the time it announced its opinion. It again chose not to

do so. It was not until its rather singular defense proved to be a failure that Black & Decker suddenly "discovered" that the jury instructions it *agreed to* and the arguments that it urged the District Court and the Court of Appeals to consider had actually served to deny it "due process" as well as its right to "trial by jury".

It is hardly fair to allow a litigant to bitterly criticize Courts for "ignoring" arguments when that litigant never bothered to raise those arguments at any time before those same courts. It is also hardly even-handed justice to ask the opposing party to respond to the defenses raised by his opponent over a period of many years and then, after spending a long time and a great deal of expense in resolving the litigation, face entirely new arguments which were never presented for consideration when they could have been properly answered if raised in a timely fashion.

This latter point has been overlooked by Black & Decker in its efforts to claim that its "rights" are the only matters that need be considered by this Court. Assuming, *arguendo*, that the procedures which Black & Decker believes should have been employed before the District Court and Court of Appeals had been raised in a timely fashion, the trial court and parties could have submitted jury instructions which would have satisfied Black & Decker's formulation of the requirements mandated by this Court in *Haslip*. Instead of asking to have the trial court do so, or even raising this issue, Black & Decker was content to stand before the trial court and not only allow this purported "error" to take place, but affirmatively contributed to the "error" when it *agreed* to the method and manner of instructing this jury on punitive damages! It then exacerbated the supposed error in this case by failing to request that the District Court conduct the type of review which it now claims was mandated by the decision of this Court in *Haslip* and also when it failed to present that same demand to the Court of Appeals.

In other words, after Black & Decker *affirmatively caused* the so-called errors which it seeks to raise before this Court, it asks the Court to accept review and set aside plaintiff's hard-won judgment on the basis of error placed in the record by the tactical decisions of Black & Decker itself. Is this fair to plaintiff? Does this type of gamesmanship accord plaintiff or any other litigant "due process"?

Of course not!

The manner in which Black & Decker has chosen to treat the lower courts in this case as well as this Court in the manner in which it has raised these arguments in its Petition demonstrates a rather fine disregard for the concept of fundamental fairness which underlies our entire system of justice. Seeking judgment notwithstanding the verdict or a new trial on the basis of error which a party placed in the record through its own acquiescence or silence, and then criticizing the lower courts for "ignoring" arguments which were never presented, should not be considered by this Court as a basis for accepting review.

Plaintiff also respectfully urges that review is not warranted where the perceived conflict between the decision of the Court of Appeals in this case and the decisions of other reviewing courts simply does not exist. As will be discussed in more detail, *infra*, the Court of Appeals rejected Black & Decker's "all or nothing" proximate cause defense, but then independently considered the issue of punitive damages and ordered a remittitur under the standards that comport with the decision of this Court in *Haslip*. Moreover, and contrary to the argument presented by Black & Decker, as the review of punitive damage awards required by Illinois law comports with the type of review set out in *Haslip*, the treatment of this award by the Court of Appeals need not be disturbed by this Court.

Unlike petitioner's view of the West Virginia courts in *TXO Production Corporation* v. *Alliance Resources Corp.*, 419 S.E.2d 870 (W.Va. 1992), *cert. granted*, 61 U.S.L.W. 3206 (U.S. Nov. 30, 1992) (No. 92-479), the Illinois courts do not permit an award of punitive damages based simply on a party's net worth or because a party's conduct may be "bad". The rigorous review of punitive damages required by Illinois law parallels (and even exceeds) the type of review discussed by this Court in *Haslip*. That same intense scrutiny may be found in the opinion of the Court of Appeals in this case, which examined and adopted the appropriate criteria for reviewing an award of punitive damages. Accordingly, the perceived conflict raised by Black & Decker in the Petition does not exist.

As noted by the Court of Appeals in its opinion, this jury decided to award punitive damages based upon the testimony of a former Black & Decker mechanical engineer "who oversaw the design and development of the prototype for the miter box saw." (App. 17a) That witness testified that Black & Decker knew of the potential harm which would result from placing this saw in the stream of commerce without the appropriate guard. "Impatient B&D officials, however, ordered [the witness] to proceed with the saw's development without the right lower guard" rather than delay its sale to the public. (*Id.*)

The Court of Appeals also reviewed evidence which demonstrated that Black & Decker engaged in lengthy correspondence with Underwriters Laboratory seeking to delay new safety standards. Since "products that do not meet UL standards are at a competitive disadvantage, Ross maintains that the delay in B&D's re-design of the saw demonstrates that it was concerned with profits only, and not safety", and therefore was proof of Black & Decker's "flagrant disregard for the safety of the public." (App. 18a)

The Court of Appeals concluded that this and other evidence was "sufficient to support a judgment that B&D's conduct evinced a flagrant disregard for public safety; thus the jury's award of punitive damages was proper." (App. 18a-19a) After it determined that punitive damages were warranted, the Court reviewed the amount of punitive damages in light of the nature and enormity of the wrong, the financial status of the defendant, and the potential liability of the defendant resulting from multiple claims.[2] The Court then noted that all of these factors were not exhaustive as each case must be "carefully assessed in light of the specific facts involved, and the ultimate determination should be governed by the circumstances of each particular case. Moreover, the underlying purpose of an award of punitive damages must be satisfied." (App. 19a-20a) The Court of Appeals also very clearly couched its review of punitive damages in light of the principle that because of their "penal nature, punitive damages are not favored in the law, and courts must be cautious in seeing that they are not improperly or unwisely awarded." (*Id.*)

With these principles in mind, the Court of Appeals reduced the amount of punitive damages awarded by the jury from $10,000,000 to $5,000,000. In doing so, the Court observed that Black & Decker not only had a net worth of $1,933,608,000, but also that the company had obtained a profit of more than $51,000,000 in 1990 from the sale of power tools alone. (App. 20a) Focusing on this figure, an appropriate consideration in light of the fact that those profits were based in large part on the sale of this saw without the required guard, the Court of Appeals reduced

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[2] The opinion of the Seventh Circuit notes that Black & Decker never raised the issue of multiple claims in regard to these damages, and the Court could not consider this factor in the absence of any evidence or argument on the issue.

the award from $10,000,000 to $5,000,000 as representing "roughly ten percent of B&D's 1990 power tool profits". The Court believed this reduced amount would "serve the twin purposes of punishment and deterrence" by preventing Black & Decker from behaving "in a like manner again" and also put a "sufficient dent in its profits to serve as a fitting punishment." (App. 21a)

How does this analysis conflict with the principles adopted by this Court in *Haslip*? Plaintiff respectfully submits that there is no conflict. The jury award in this case, as well as the post-award review by both the District Court and the Court of Appeals, demonstrates that the award was not the result of "caprice, passion or prejudice," but that it was assessed—and later reduced—based on considerations which clearly comport with *Haslip*. This award, even as reduced on appeal, bears a very real and very understandable relationship not only to the enormity of the conduct, but also to the *undisputed* award of compensatory damages in the amount of $2,000,000 by the same jury.[3]

The only other basis for potential review raised by Black & Decker in its request for review is the claim that the

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[3] Black & Decker *never* challenged the award of compensatory damages as excessive nor did it even mention the word remittitur with regard to these damages at any time. Accordingly, the reduced amount of punitive damages in this case are two and one-half times the amount of the unchallenged and appropriate award of compensatory damages. Plaintiff urges that such an award is not an example of "punitive damages run wild" as Black & Decker suggests. The award also bears a reasonable and rational relationship to the *profits* obtained in just one year from the sale of the defective product that caused the injury. As this saw remained on the market for *several years* in this condition, punitive damages which are two and one-half times the amount of compensatory damages and which leave the wrongdoer with 90% of the profits gained by its misconduct in a *single year* are hardly an example of "punitive damages run wild".

decision of the Seventh Circuit in this case employs a "constitutionally flawed state post-verdict review criteria" as these issues were not "submitted to the jury through instructions." (Pet. 15) This argument is itself erroneous. Further, it should be weighed in light of the fact that Black & Decker concedes in footnote 2 on page 4 of the same Petition that the "parties agreed" upon the "punitive damage jury instruction that the district court submitted to the jury." The concession that Black & Decker "agreed" to the jury instructions on punitive damages given in this case demonstrates far more eloquently than anything plaintiff may say why review is not warranted in this case.

Black & Decker claims that following *Haslip*, "a district court sitting in diversity must instruct the jury on the totality of the substantive state law of punitive damages", including "post-verdict factual considerations." (Pet. 14) Defendant states that the "Seventh Circuit employed constitutionally flawed state post-verdict review criteria that were not submitted to the jury through instructions" and, as a result, that Court "usurped the function of the jury in contravention of Black & Decker's Seventh Amendment rights by making findings of fact pursuant to state-law criteria never considered by the jury." (Pet. 15)

Black & Decker's claim that it was denied its Seventh Amendment rights to trial by jury when the jury was not permitted to consider what Black & Decker now asserts were "proper" instructions flies in the face of its carefully-hidden concession that this jury considered the question of punitive damages on the basis of instructions that were "agreed upon" by the "parties". Having agreed to giving these instructions *several months after the announcement of Haslip*, Black & Decker's conduct was the effective cause of the purported "error" which it now seeks to have reviewed by this Court!

It is respectfully urged that a party may not agree to giving jury instructions and then, following a verdict which is returned on the basis of such purportedly "erroneous" instructions, claim that it was "error" to give those instructions or fail to give others *which it never bothered to tender to the jury*. It is further urged that where the "failure" to give those instructions is *not* raised in its motion for judgment notwithstanding the verdict or for a new trial, is *not* raised in its brief and argument before the Court of Appeals, but is raised *for the first time* in a Petition for Rehearing years after the jury reached its verdict on the basis of these supposedly-erroneous instructions, that the issue has not been preserved for review.

Again, plaintiff respectfully, but also most emphatically, urges that this request for review should be denied where it is presented to this Court based on non-existent error created *solely* not by the harshly-criticized lower courts, but by the petitioner itself.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S ARGUMENTS HAVE NOT BEEN PROPERLY PRESERVED FOR REVIEW BY THIS COURT AND, IF ACCEPTED, WOULD SERVE TO DENY PLAINTIFF EVEN THE SEMBLANCE OF THE SAME RIGHT TO "DUE PROCESS" INVOKED BY PETITIONER.

Petitioner, Black & Decker, asks this Court to consider two issues: First, whether the award of punitive damages in this case was allowed to stand when the lower courts reviewed these damages in a manner that Black & Decker believes was contrary to the "post-verdict review criteria approved by this Court in *Pacific Mutual Life Insurance* v. *Haslip*, 111 S.Ct. 1032, 1043 (1991)", thereby violating Black & Decker's "due process rights." (Pet. i); Second,

Black & Decker claims that the appellate "post-verdict review of the punitive damage award violates Black & Decker's Seventh Amendment right to a trial by jury." (*Id.*)

Both of these arguments were raised for the first time in the Petition for Rehearing and Suggestion, in the Alternative of Rehearing *in banc* presented to the Seventh Circuit after that Court had announced its decision affirming the award of compensatory damages but reducing the award of punitive damages by one-half. As such, plaintiff respectfully submits that these issues have not been preserved for review by this Court.

In *Browning-Ferris Industries* v. *Kelco*, 109 S.Ct. 2909 (1989), this Court stated that it would not consider questions relating to punitive damages where the petitioner had failed to raise this type of challenge before either the District Court or the Court of Appeals. (109 S.Ct. at 2921.) The Court in *Browning-Ferris* also stated that mere general objections or non-specific arguments would not be considered by the Court as sufficient to preserve these arguments for review. As Mr. Justice Blackman observed in that opinion, the Court would not "assume that a non-constitutional argument [objection] also includes a constitutional one", stated that the Court would not assume that the necessary objections had been made, and concluded that the Court would not "attempt to decide the question in the absence of a record on the due process point developed in the District Court and the Court of Appeals." (109 S.Ct. at 2921, fn. 23.)

This Court agreed to consider the issue of punitive damages in its later decision in *Pacific Mutual Life Insurance Company* v. *Haslip*, 111 S.Ct. 1032 (1990), but did not retreat from its admonition that it would not consider these issues when raised in the absence of a complete record at the trial level nor where these arguments were

otherwise "tardily raised". (111 S.Ct. at 1040.) Despite the fact that Black & Decker engages in a lengthy—albeit inaccurate—analysis of the *Haslip* decision and its application by various other courts in its petition, it has carefully avoided any discussion of the critical question of timeliness in its presentation to this Court. It has done so because it knows full well that these issues have *not* been preserved in this case.

In *Browning-Ferris*, this Court stated that it would not assume that a non-specific objection also contained a specific constitutional challenge, nor would it attempt to decide such questions in the absence of a record "on the due process point developed in the District Court and the Court of Appeals." No such "constitutional objections" to the award of punitive damages or the manner in which these damages were awarded (or later reviewed) appears anywhere in the record of the trial in this case nor in the record of proceedings before the Court of Appeals prior to the belated introduction of these matters on Petition for Rehearing.

The motion for judgment notwithstanding the verdict or for a new trial pursuant to Federal Rule of Civil Procedure 50(b), as well as the supporting Memorandum of Law submitted by Black & Decker to the District Court are reproduced in full as an appendix to this brief. If this Court wishes to do so, it can review those pleadings and see that not *a single word* regarding the decision of this Court in *Haslip* appears in those documents. Further, not a *single reference* to any of the arguments now presented by Black & Decker appears in either the motion or the supporting memorandum. Moreover, while it is not practical to reproduce the entire transcript of proceedings as well as the common law record developed during the trial, suffice it to say that a review of the transcript and the record below would also reflect not one reference to *Haslip* or

to any of the arguments now presented in Black & Decker's petition to this Court.

Since it is anticipated that Black & Decker will take advantage of its right to file a Reply Brief to "respond" to what it will characterize an argument being "first raised in the brief in opposition", the response given by Black & Decker to this same issue before the Court of Appeals must be addressed by plaintiff in this brief. When the fact of Black & Decker's patent waiver of these issues was presented to the Seventh Circuit in the Answer to the Petition for Rehearing filed in that Court, Black & Decker sought to file a Reply to the Answer. In that document, Black & Decker claimed that its motion for judgment notwithstanding the verdict and motion for new trial established that it did object to the "punitive damages award on the ground of excessiveness due to the lack of proportionality to the conduct involved and the severity of the injury incurred", referring the Court of Appeals to pages 6 and 7 of that motion. (Reply 3) Assuming that Black & Decker presents the same factual response that it did before the Court of Appeals in its Reply Brief to this Court, turning to pages 6 and 7 of the motion for judgment notwithstanding the verdict and motion for new trial, this Court will not find any reference to punitive damages whatsoever. The argument on those pages is devoted instead to a discussion of various trial error which was later rejected by both the District Court and the Court of Appeals.

Assuming that Black & Decker erroneously referred the Court of Appeals to its motion rather than to its memorandum in support of its request for judgment notwithstanding the verdict, pages 3 through 8 of that memorandum discuss the issue of punitive damages—but do *exclusively* in light of Illinois law. Again, not only is the word "proportionality" conspicuous by its absence, but the District Court was never asked to consider any claim of deprivation of

due process, deprivation of any right guaranteed under the Constitution of the United States, or to consider the potential impact of the decision of this Court in *Haslip* on the issue of the imposition, review, or determination by a jury of the question of punitive damages. The discussion of punitive damages in the memorandum of law presented by Black & Decker to the District Court rests exclusively on a discussion of Illinois law after it begins with the statement that in a "diversity action, State law determines whether punitive damages are allowed." (Memorandum 3, citing *In Re Aircrash Disaster Near Chicago*, 644 F.2d 594, 605-06 (7th Cir. 1981).)

The issues Black & Decker seeks to raise before this Court were thus clearly never developed or even addressed before the District Court. Were they then raised before the Court of Appeals before it announced its opinion?

Of course not!

The specific arguments now presented by Black & Decker to this Court appear nowhere in the more than 70 pages of briefs submitted to the Court of Appeals.

Black & Decker's initial brief in the Supreme Court was 50 pages in length. At page 35 of that brief, a reference to the decision of this Court in *Haslip* appears for the first and only time in a one-paragraph, conclusory argument that the award of punitive damages in this case "violated the due process clause of the United States Constitution." Defendant stated that the "circumstances of the case violated the standards set forth in *Haslip* inasmuch as the trial court did not provide any guidance or otherwise provided a sufficiently definite and meaningful constraint on the discretion of the jury." (Br. 35.) *No reference whatsoever appears in this paragraph nor anywhere else in defendant's brief to the question of jury instructions, the propriety of the instructions under Illinois law, nor a potential conflict between the Illinois law and Pacific Mutual v. Haslip!*

The question of jury instructions *was* raised by Black & Decker in its Reply Brief, but then only in a three-sentence addition to its prior conclusory argument. Again, the arguments Black & Decker raises in its petition to this Court do not appear in this brief. The sole reference to instructions was as follows:

> "For instance, the court did not instruct the jury that evidence of post-manufacture changes should only be considered as to the issue of feasibility and not to punitive damages. Hence, the instructions to the jury did not act as a constraint on its discretion. Furthermore, as noted above, the award is unreasonable inasmuch as it was five times more than the amount of the Plaintiff's compensatory damages and there is no evidence that the conduct in question rose to the level of reckless disregard." (Rep. 14.)

During the oral argument, counsel for plaintiff was asked several questions by members of the panel regarding the amount of punitive damages. In response to one question relating to the amount of *compensatory* damages, counsel for plaintiff pointed out that Black & Decker had raised no complaint as to the amount of compensatory damages and that, while it claimed that the amount of punitive damages was "excessive," it had never specified what amount it sought in a remittitur or by what extent punitive damages *should* be reduced. During colloquy with the Court, counsel for plaintiff pointed out that if anyone was being deprived of a constitutional right to address the question of punitive damages, it was plaintiff who was forced to respond to a general request for a remittitur without having any specific amount to respond to as "proper" or "appropriate."

When counsel for Black & Decker rose to give his rebuttal, he was specifically asked by the Court whether Black & Decker was complaining about the amount of punitive damages or whether Black & Decker was simply claim-

ing that no punitive damages at all were appropriate. Counsel for Black & Decker stated that his client was not asking for a *reduction* in the *amount* of punitive damages, but claimed instead that no punitive damages should have been awarded at all.

In light of this repeated and explicit waiver of this issue, Black & Decker's attack upon the opinion of the Court of Appeals is particularly unfortunate. Just as Black & Decker attacked the trial judge in its briefs before the Court of Appeals for ruling against it when much of the so-called error was self-generated by what the Court of Appeals correctly labeled as "tactical errors" (App. 10a), its free-wheeling attacking the Court of Appeals for supposedly "failing" to consider arguments which were *never presented* goes beyond the bounds of advocacy. Plaintiff respectfully submits that review should not be accepted under such circumstances.

Plaintiff believes that it is abundantly clear that the arguments now raised by Black & Decker were indeed "tardily raised". While plaintiff believes that this waiver should be sufficient to preclude review of these arguments by this Court, he also respectfully submits that considering these arguments now would deny him his own right to due process and fundamental fairness before the courts.

Black & Decker asserts that the review procedures adopted by both the District Court and the Court of Appeals were erroneous in light of what it believes were different procedures to be employed pursuant to the decision of this Court in *Haslip*. However, Black & Decker consistently urged both the District Court and the Court of Appeals to apply the punitive damage review procedure adopted by the *Illinois* court system. At no time did it ever raise any of the specific arguments presented in its petition to this Court before either the District Court or the Court of Appeals.

At each stage of the proceedings below, these arguments *could* and perhaps *should* have been raised by defendant. It chose not to do so, effectively denying plaintiff his own right to a fair trial and due process of law where this matter remained before the court system for several years, was resolved first by a jury and then reviewed by the District Court, and then presented to the Court of Appeals in hotly-contested briefs and oral argument directed to issues quite distinct from those now presented to this Court. It was only when it was no longer possible to "cure" any possible trial error, that Black & Decker belatedly "discovered" that both the District Court and the Court of Appeals were guilty of "ignoring" *Haslip*.

Black & Decker apparently believes that it has a right to litigate a matter for several years, take its chances before first a jury and then a reviewing court, and then decide to change its defense strategy and raise new arguments which it never gave its opponent or the courts a chance to consider. It was hardly just for Black & Decker to withhold these arguments at a time when they could have been considered by the lower courts and applied, if proper, before the entry of judgment. Failing that, they could have been raised in the post-judgment review process which Black & Decker now complains was performed in an improper fashion. Of course, these arguments surely could have been presented to the Court of Appeals in a timely manner if Black & Decker believed that the Court of Appeals was required to apply some form of review *other* than that which Black & Decker explicitly asked it to adopt in its briefs.

Of course, Black & Decker chose to take none of these steps, preferring to wait to see if its alternative strategy would bear fruit before switching to its latest efforts in the Petition for Rehearing in the Court of Appeals. The justice of this approach eludes plaintiff, who can only state

that if Black & Decker seriously believes in this formulation of due process, then the award of punitive damages in this case should never have been reduced in favor of a defendant who seems to believe that it can treat the Courts and its fellow citizens in such a shameless fashion.

Black & Decker was not denied due process or its right to trial by jury by either plaintiff or the lower courts in this case. Any arguable deprivation (which does not exist) was a result of trial strategy or, as stated by the Court of Appeals, "tactical errors" engaged in by a defendant who gambled everything on setting aside an entire verdict rather than attempt to deal with the unpalatable but overwhelming evidence of its willful misconduct.

II.

THE REVIEW PROCEDURE ADOPTED BY THE DISTRICT COURT AND COURT OF APPEALS IN THIS CASE IS NOT CONTRARY TO *HASLIP* NOR IN CONFLICT WITH ANY DECISIONS OF THE OTHER COURTS OF APPEAL WHICH HAVE FOLLOWED THE *HASLIP* DECISION.

Turning to the "merits" of Black & Decker's argument, it claims that the District Court "denied Black & Decker's post-trial motions without reflecting its reasoning" and also that the "Seventh Circuit upholds the methodology employed by the District Court in disposing of Black & Decker's post-trial motions on punitive damages." (Pet. 7-8) Nothing could be further from the truth.

The decision of the District Court is admittedly sparse. However, that decision reflected the emphasis given by defendant to everything but the issue of punitive damages at trial. As the District Court noted in its opinion, defendant's "trial strategy was to make this a single issue case. It was defendant's contention that the plaintiff [had not been injured in the manner that he claimed and that the

defect in defendant's saw was not the proximate cause of his injury.] Both sides presented evidence on this issue and the plaintiff prevailed." (App. 23a) In light of the fact that Black & Decker in the motion for judgment notwithstanding the verdict and motion for new trial, along with its supporting memorandum, spent virtually no time discussing the question of punitive damages, the District Court's purported "failure" to consider the non-arguments presented by Black & Decker is easy to understand. Rather than "ignore" Black & Decker's formulation of the review procedure required by *Haslip*, the District Court simply addressed the arguments presented to it by Black & Decker, resolving them in favor of plaintiff and against Black & Decker.

The treatment of punitive damages by the Court of Appeals was quite lengthy and comports with the review procedures discussed by this Court in *Haslip*.[4]

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[4] Although the petition filed by Black & Decker before this Court focuses on the question of punitive damages, Black & Decker is not content to restrict its criticism of the Court of Appeals solely to its treatment of punitive damages. In footnote 3 at page 6 of the petition, this Court is referred to the fact that the Court of Appeals purportedly "failed to address the effect of the District Court permitting respondent to introduce evidence of two subsequent injuries involving Miter saws." Black & Decker claims that under Illinois law, "post-occurrence evidence is inadmissible on punitive damage liability, and should not have been considered by the jury on that question." (*Id.*)

This criticism of the Court of Appeals is particularly reprehensible in light of the fact that the Court of Appeals *did* address this question when it reviewed the manner in which Black & Decker treated the question of feasibility at trial. At page 10 of its opinion (App. 10a), the Court of Appeals noted that under Rule 407, "post-manufacture remedial measures are admissible if the manufacturer disputes the feasibility of remedial measures." The Court of Appeals notes in its opinion that although Black & Decker claimed that it had "admitted the feasibility of the remedial measures it later took", that this claim was a patent misstatement since this

(Footnote continued on following page)

The Court of Appeals devoted six pages of its 21-page opinion to the issue of punitive damages, despite the fact that it first had to deal with the plethora of supposed trial error raised by Black & Decker. That treatment, which came after the explicit waiver of the issue of punitive damages by Black & Decker's counsel during oral argument, clearly comports with the decision of this Court in *Haslip*.

At page 10 of its petition, Black & Decker states that following *Haslip*, "federal courts have measured state post-verdict review standards against *Haslip* to ensure that any punitive award is constitutionally grounded." Black & Decker then argues that Illinois law rejects the "proportionality" requirement of *Haslip* and states that an Illinois court will not disturb a punitive damage award "unless the award is the result of 'passion, partiality or corruption.' " (Pet. 12) Black & Decker states that this Court and other intermediate federal reviewing courts have held that this standard is "constitutionally deficient in the absence of a full panoply of Alabama-style due process protections" as approved by this Court in *Haslip*. (*Id.*)

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[4] *continued*

admission "occurred during adverse examination by the plaintiff of the defendant's expert *after* evidence of the subsequent remedial measures had been introduced by the plaintiff." (*Id.*, emphasis in original.) The Court of Appeals concluded that the defendant could have stipulated to the feasibility or included the admission of feasibility as an uncontested fact in its pretrial memorandum. Its failure to do so was an extension of its "single issue" strategy and, according to the Court of Appeals, was another instance of a "tactical trial error" created by defendant itself rather than committed by the trial court. (App. 10a)

Why Black & Decker persisted in even raising this issue, and why it persists in presenting it in the same false fashion already rejected before the Court of Appeals, is indeed a mystery.

The manner in which Illinois law treats punitive damages is not in conflict with the decision of this Court in *Haslip*. Just as this Court declined to adopt any rigid "proportionality" test in *Haslip* or hold that there is some constitutionally-mandated compensatory/punitive ratio, the Illinois courts have rejected the same rigid proportionality test. However, Illinois has long-since adopted standards which are even more vigorous than those adopted in Alabama or by this Court in *Haslip*. These standards are reflected in the opinion of the Court of Appeals in this case.

Under Illinois law, a jury is not even permitted to consider the issue of punitive damages until a trial court makes a preliminary finding that the circumstances of a given case warrant the imposition of such damages. That requirement predates the decision of this Court in *Haslip* and the adoption of less rigorous procedures by the courts of the State of Alabama. The same rigorous scrutiny is required following the award itself.

This early and rigorous review of punitive damages was first recognized by the Illinois courts in *Moore* v. *Jewel Tea Company*, 46 Ill.2d 288 (1970), cited most recently by the Illinois courts in *Loitz* v. *Remington Arms Company*, 138 Ill.2d 404 (1990). Under this test, the Illinois courts have repeatedly struck down punitive damage awards where they are improvidently awarded by juries under circumstances which the trial or reviewing courts later believe are inappropriate.

Rather than give jurors free reign to award punitive damages based upon whim or the eloquence of a plaintiff's counsel, the courts of Illinois recognize that because of their "penal nature, punitive damages are not favored in the law" (*Loitz* v. *Remington Arms Company*, 138 Ill.2d at 414), the "initial decision of whether punitive damages may be imposed in a particular case in this State is a matter normally reserved to the trial judge." (*Id.*, citing *J.I.*

Case Company v. *McCartin-McAuliffe*, 118 Ill.2d 447, 453 (1987).) The award is then reviewed again after the verdict and, as in *Loitz*, freely set aside if inappropriate or excessive.

While it is outside the scope of the present brief to engage in a lengthy analysis of Illinois law on the question of punitive damages, the law of Illinois as discussed in the Opinion of the Court of Appeals clearly goes far beyond that of Alabama in its effort to ensure that punitive damages are subject to rigorous judicial control. That rigorous control is also reflected in the lengthy discussion of this issue by the Court of Appeals in this case, and in its reduction of punitive damages by one-half under its analysis of Illinois law.

The Court of Appeals cited both *Loitz* and *J.I. Case* as guiding its determination to carefully review the award of punitive damages in this case. At pages 17 through 19 of its opinion, the Court of Appeals weighed these factors in light of the evidence that Black & Decker was advised by its own design engineer that the failure to place a guard on this product was likely to lead to injury. When "[i]mpatient B&D officials, however, ordered [the designer] to proceed with the saw's development without the right lower blade guard", and when Black & Decker took steps to discourage Underwriters Laboratories from promulgating a product safety standard which would have required the fitting of this guard to the saw (App. 17a-18a), the Court of Appeals found that the award of punitive damages in the case before it fit well within the Illinois criteria for the imposition of those damages. (App. 19a)

Contrary to the claim presented by Black & Decker in its petition, the standard for review of punitive damages under Illinois law, as adopted by the Court of Appeals in this case, is not "constitutionally deficient" as it pro-

vides far more than the "full panoply of Alabama-style due process protections" noted in *Haslip*. Further, the basis upon which the Court of Appeals chose to reduce punitive damages from $10,000,000 to $5,000,000, based not upon the simple fact of Black & Decker's abundant net worth, but as reflecting its patent misconduct and as representing only a small percentage of one year of profit derived from the sale of these defective products, establishes that the Court of Appeals in this case applied standards that met *and exceeded* standards measured under Alabama law and *Haslip*.

Black & Decker's review of Illinois law is particularly sparse, and rests on quotes taken out of context rather than reflecting an effort to give this Court a true picture of how that jurisdiction treats punitive damages. A far better picture of how Illinois treats these awards may be seen in the *Loitz* decision and the cases cited in *Loitz* which show that Illinois courts have unhesitantly vacated punitive damage awards or cut them dramatically under standards which exceed those noted in *Haslip*. Illinois very clearly recognizes that punitive damages must be subject to intense review by the courts. That recognition was adopted by the Court of Appeals in this case, which used appropriate and reasonable factors to review and later reduce this award of punitive damages to serve the *same* purposes recognized by the Alabama courts and approved by this Court in *Haslip*.

III.

BLACK & DECKER WAS NOT DENIED ITS RIGHT TO TRIAL BY JURY THROUGH THE ALLEGED FAILURE TO PROVIDE JURY INSTRUCTIONS WHICH IT NEVER TENDERED, WHICH IT FAILS TO DELINEATE BEFORE THIS COURT, AND IN LIGHT OF THE FACT THAT IT ADMITTEDLY AGREED TO THE MANNER IN WHICH THIS JURY WAS INSTRUCTED ON THE QUESTION OF PUNITIVE DAMAGES.

The final argument presented by Black & Decker is that it was denied it right to trial by jury when the Seventh Circuit "applied de novo the post-verdict review criteria prescribed [by Illinois law] [since these instructions] were not included in the District Court's punitive damage jury instruction." (Pet. 13) Black & Decker asserts that this Court's decision in *Haslip* requires that a "district court sitting in diversity must instruct the jury on the totality of the substantive state law of punitive damages." (Pet. 14)

This argument flies in the face of Black & Decker's concession in footnote 2 at page 4 of its petition that the parties "agreed upon the following punitive damage jury instruction that the district court submitted to the jury." Further, Black & Decker *never* submitted any additional jury instructions before the District Court. Black & Decker also has *never* formulated a jury instruction either before the Court of Appeals, in its Petition for Rehearing before the Court of Appeals, or before this Court in its request for review. Apparently, Black & Decker believes that the District Court should have drafted these instructions *sua sponte* in order to conform to a formulation of *Haslip* which Black & Decker has never bothered to articulate up to and including its presentation before this Court.

The "*Hazelwood*" factors which Black & Decker insists should have been present in the jury instructions are in fact contained in content in the actual instruction proffered to the jury. If any of these factors were missing,

or Black & Decker wished to have any additional items included, it would have been a simple task for its counsel to present that request to the District Court. His failure to do so, and Black & Decker's failure to point with specificity to any omission in the tendered instruction or supply any alternative jury instruction, clearly waives its right to present this argument as a basis for review by this Court.

Parties can and should raise objections to jury instructions in a timely fashion before the purportedly-erroneous instruction is given to the jury. By waiting for years after this instruction was tendered to raise its present complaints, plaintiff respectfully urges that Black & Decker's argument in this regard falls squarely within the prohibition against "tardily raised" arguments of this nature as pointed out by this Court in *Haslip*.

CONCLUSION

The Petition for a Writ of Certiorari presented by Black & Decker, Inc. should be denied by this Court.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JERRY L. ROSS,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	No. 90 C 4439
	)	
BLACK AND DECKER, INC.,	)	JUDGE MAROVICH
	)	
Defendant.	)	Magistrate Rosemond

DEFENDANT, BLACK & DECKER (U.S.) INC.'s MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 50(b) AND MOTION FOR NEW TRIAL IN THE ALTERNATIVE TO MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 50(b)(d) and 59

NOW COMES the Defendant, BLACK & DECKER (U.S.) INC.'s ("BLACK & DECKER") by its attorneys, FRENCH KEZELIS & KOMINIAREK, P.C., and, pursuant to Federal Rules of Civil Procedure 50(b) and 59, moves the Court to enter judgment notwithstanding the verdict of the jury in favor of the Plaintiff or, in the alternative, in the event that said motion be denied, that a new trial be granted or, in further alternative in the event said motions are denied, the Court strike the punitive damages and enter a remititur and for grounds for said motions says:

I

1. Defendant, BLACK & DECKER moves that the Court enter judgment notwithstanding the verdict of the jury against the Plaintiff and in favor of the Defendant and in support of said motion says:

(a) That the verdict of the jury is contrary to the law.

(b) That the verdict of the jury is contrary to the evidence.

(c) That the verdict of the jury is contrary to the law and the evidence.

2. The Court erred in failing to direct a verdict in favor of the Defendant at the close of the evidence introduced by the Plaintiff in that as a matter of law Plaintiff failed to introduce any evidence which would justify the submission of this case to a jury.

3. That the Court erred in failing to direct a verdict in favor of the Defendant at the close of all the evidence.

4. That the Court erred in submitting this cause to the jury on the question of the liability of the Defendant to the Plaintiff.

5. That the Court erred in submitting this cause to the jury on the question of the Defendant's actions or of the product proximately causing injury to the Plaintiff.

6. That the Court erred in submitting to the jury the question of punitive damages.

7. In a diversity action such as the case at bar, State law governs disposition of a motion for judgment notwithstanding the verdict. *F.W. Hempel & Co., Inc. v. Metal World, Inc.*, 721 F.2d 610 (7th Cir. 1983). In Illinois, a judgment notwithstanding the verdict should be entered

in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill.2d 494, 329 N.E.2d 504 (1967).

8. On May 4, 1983, the Plaintiff, Jerry L. Ross, used a DeWalt 10 inch power miter box electrical saw manufactured by Black & Decker in July of 1978. At the time of manufacture, no specific industry standards or other standards governed the design of miter box saws. This saw met *all* electric portable tool requirements. The power miter box had not been altered since its manufacture. The Plaintiff operated the saw at a 45 degree angle to the right (facing the operator's view) and held the piece of wood being cut to the right of the blade with his left hand and brought the blade down with his right hand. As he completed the cut, Plaintiff's lower arm contacted the rotating teeth of the blade, resulting in a near amputation of the Plaintiff's left hand.

9. A stationary metal enclosure prevented inadvertent contact to the upper portion of the saw blade. A clear plastic guard which extended down the left side of the blade prevented contact to the lower portion of the saw blade on the left side. The motor of the saw prevented contact with the blade on the lower right side. In this particular instance, the evidence overwhelmingly establishes that the Plaintiff brought his hand straight up underneath into the blade.

10. That Plaintiff at trial claimed the product was unreasonably dangerous because it lacked a right lower blade guard. As the evidence overwhelmingly demonstrates, the manner in which the Plaintiff brought his hand into the blade would not have been prevented by a right lower

blade guard. Hence, there was no injury resulting from a product which was unreasonably dangerous. In Illinois, to prevail on product liability, an injured party must demonstrate that he was injured, that the injury resulted from a condition of the product, that the condition was unreasonably dangerous, and that the unreasonably dangerous condition existed at the time the product left the Defendant's control. *Aetna Insurance v. Emilio Brothers Meat Co.*, 182 Ill. App.3d 863, 538 N.E.2d 707 (1989).

11. That in further support for its motion for a directed verdict or, in the alternative, a judgment notwithstanding the verdict or, in the alternative, a new trial, Defendant incorporates by reference its memorandum in support of its post-trial motions.

WHEREFORE, the Defendant BLACK & DECKER (U.S.), INC., moves that this Court vacate the judgment entered in this cause on May 31, 1991, and vacate and set aside the verdict of the jury herein, and enter judgment notwithstanding the verdict against the Plaintiff and in favor of the Defendant.

II.

In the alternative, in the event that the motion of the Defendant for judgment notwithstanding the verdict be denied, Defendant moves that this Court vacate and set aside the judgment entered in this cause on May 31, 1991, vacate and set aside the verdict of the jury herein and grant a new trial to the Defendant and as grounds for said motion says:

1. That the verdict of the jury is contrary to the law and the evidence.

2. That the verdict of the jury is contrary to the clear weight of the evidence. *Foster v. Continental Can Corp.*, 783 F.2d 735 (7th Cir. 1986).

3. That in support of the arguments that the verdict is contrary to the clear weight of the evidence, Defendant adopts hereto the arguments raised in its motion for judgment notwithstanding the verdict and by incorporated reference, the memorandum in support of post-trial motions.

4. That the Honorable Court erred when it quashed the notice of BLACK & DECKER of the deposition of a witness who could not attend trial. At trial, Plaintiff's expert, Mr. Clark, testified to a conversation with Robert Ruth concerning the design of the miter box saw in issue. According to Mr. Clark, he suggested that a right lower blade guard be attached to the saw before production. Mr. Ruth allegedly rejected the suggestion.

5. Mr. Ruth retired from BLACK & DECKER and his whereabouts was unknown to BLACK & DECKER and its attorneys until only recently. Upon locating him, Defendant learned that Mr. Ruth has cancer and that his condition is terminal. Further, Mr. Ruth now receives chemotherapy every single day near his home in Lancaster, Pennsylvania and, because of his medical condition and ongoing chemotherapy, he is unable to travel to Chicago in person in order to testify. This Court quashed the notice of the deposition of Mr. Ruth and thus prejudiced the Defendant from preserving his testimony and from presenting his testimony during the trial. This testimony was needed to rebut the testimony of Mr. Clark.

6. In the alternative, this Honorable Court erred in denying Defendant's arrangements to have Mr. Ruth's testimony broadcast live over closed circuit television from

Lancaster, Pennsylvania to a location only three blocks from the courthouse. The facility was adequate to accommodate the judge, jury, court reporters and all attorneys. BLACK & DECKER further agreed to bear the entire expense of this closed circuit broadcast. Closed circuit transmission in the courthouse would be impossible due to a lack of necessary telephone hook ups. But again, Defendants were severely prejudiced by not being allowed to present Mr. Ruth's testimony during the trial.

7. That this Court erred in allowing the Plaintiff to file interrogatories after discovery had been closed and to compel this Defendant to answer said interrogatories within seven days even though discovery had been closed.

8. That this Honorable Court erred in allowing Plaintiff to notice up the deposition and proceed with the deposition of witnesses after discovery had closed.

9. That this Court erred in permitting testimony as to standards which were promulgated after the manufacture of this machine. In Illinois, to be admissible, evidence of standards promulgated by industry, trade or regulatory groups or agencies must be relevant in terms of both time and conduct involved. *Murphy v. Messerschmidt*, 69 Ill.2d 79, 84, 368 N.E.2d 1299 (1977); *Ruffiner v. Material Service Corp.*, 116 Ill.2d 53, 56, 506 N.E.2d 581 (1987). Admission of the subsequently drafted, released and promulgated industry standards violated the rules of *Murphy* and *Ruffiner*. Such evidence was not relevant in time as these standards were not even in existence at the date of the manufacture of the saw. Accordingly, admission of these standards constituted reversible error. BLACK & DECKER can be held accountable only for what it knew or should have known at the time of manufacture. This error affected not only the liability verdict, but also punitive damages.

10. Similarly that this Court erred in permitting testimony on accidents which occurred not only after manufacture, but after this accident.

11. That this Court erred in permitting testimony of evidence of another manufacturer's saw even though that saw was made many years after the accident.

12. That this Court erred in permitting testimony of standards, accidents, or other products all occurring after the manufacture of the BLACK & DECKER saw without any limiting instruction to the jury.

13. That this Court erred in allowing testimony and photographs of injuries of another accident involving a BLACK & DECKER miter box saw.

14. That this Court erred in permitting the direct testimony from another case which dealt with a nonissue and had no probative value to the issues in this case. That testimony dealt with record retention and record destruction. Further, this witness had been listed in the pre-trial order as a live witness, but Plaintiff never requested him prior to trial. Further, Defendant, BLACK & DECKER, stated that this witness was available and under its control. If the Court so ordered, they would have produced him pursuant to the Court's order.

15. That this Court erred by interrupting and questioning the plaintiff's expert during defendant's cross-examination. During said cross-examination, counsel for BLACK & DECKER began to elicit testimony which impeached and contradicted the testimony of the Plaintiff's expert concerning a conversation he had with other employees at BLACK & DECKER. Without waiting for the defense counsel to finish his questioning, or for the Plaintiff to conduct a redirect, this Court started questioning the wit-

ness himself which destroyed the effect of the cross-examination by defense counsel.

16. That this Court erred during direct examination of BLACK & DECKER's expert by preventing the expert from fully apprising the jury of all of its qualifications and credentials. Instead, the Court cut this testimony short and instructed defense counsel to get to the issues. This had the effect of discrediting and belittling the expert.

17. That this Court erred in its charge to the jury by failing to give instructions on the defense of misuse of a product in a strict liability situation.

19. That this Court also erred in its charge to the jury by charging the jury on the issue of punitive damages.

21. That the Court caused the jury to become prejudiced and biased against the Defendant by advising defense counsel in front of the jury that he was "tired" of technical objections and that the jury knew what the evidence was.

20. That prejudice and bias against the Defendant prevented his Defendant from having a fair trial and due process of the law.

21. That the weight of the evidence clearly establishes that the power miter box was not unreasonably dangerous nor unsafe when put to a reasonable and foreseeable use when considering its nature and function.

22. That the weight of the evidence establishes a clear lack of any evidence that the 10 inch power miter box saw was a proximate cause of the Plaintiff's injuries.

23. That the verdict of the jury as to general damages is grossly excessive and unreasonable under the evidence.

24. That the verdict in the sum of $2,000,000 is punitive in character and contrary to the Court's rulings.

25. That verdict is so excessive that it must shock the conscience of the Court.

26. That the weight of the evidence clearly establishes the lack of any evidence supporting a verdict in the sum of $2,000,000.

27. That the Court erred in allowing the jury to consider punitive damages inasmuch as the weight of the evidence clearly establishes that the Defendant did not have a flagrant disregard for the Plaintiff or other consumers and users of the miter box saw. Hence, as a matter of law, the Court should never have submitted punitive damages to the jury.

28. That the verdict of the jury on punitive damages is contrary to the law.

29. That the verdict of the jury on punitive damages is contrary to the evidence.

30. That the verdict of the jury on punitive damages is contrary to the law and the evidence.

31. That the verdict of the jury on punitive damages is contrary to the clear weight of the evidence.

32. That the verdict of the jury as to punitive damages is grossly excessive and unreasonable under the evidence.

33. That the verdict of the jury as to punitive damages must shock the conscious of the Court.

34. That the weight of the evidence clearly establishes the lack of any evidence supporting a verdict of punitive damages in the sum of $10,000,000.00.

35. That in support of the foregoing, Defendant incorporates by reference its Memorandum in Support of the Post-Trial Motion.

WHEREFORE, the Defendant, BLACK & DECKER (U.S.), Inc., moves that this Court vacate the judgment entered in this cause on May 31, 1991, and vacate and set aside the verdict of the jury herein, and enter an order granting the Defendant a new trial on all issues.

III

In the further alternative, in the event that the motions of the Defendant for judgment notwithstanding the verdict and for a new trial on all issues and a new trial on damages only be denied, the Defendant moves that this Court vacate and set aside the judgment entered in this cause on May 31, 1991, as to punitive damages alone, vacate and set aside the verdict of the jury herein as to punitive damages, and enter a remititur.

/s/ ALGIMANTAS KEZELIS
Algimantas Kezelis, Attorney for
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JERRY L. ROSS,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	No. 90 C 4439
	)	
BLACK AND DECKER, INC.,	)	JUDGE MAROVICH
	)	
Defendant.	)	Magistrate Rosemond

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT, BLACK & DECKER (U.S.), INC.'s, MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 50(b) and MOTION FOR NEW TRIAL IN THE ALTERNATIVE TO MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 50(b)(d) and 59

NOW COMES the Defendant, BLACK & DECKER (U.S.), INC., and in support of its various post-trial motions, submits the following Memorandum of Law:

I

THE COURT SHOULD ENTER A JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, A NEW TRIAL ON THE ISSUE OF LIABILITY

The instant case arises out of an accident occurring on May 4, 1983. The Plaintiff brought his left hand into

the rotating teeth of the saw blade of a DeWalt 10 inch power miter box electrical saw manufactured by BLACK & DECKER in July of 1978. Plaintiff filed a lawsuit based on strict products liability and also sought punitive damages. This action is based upon diversity. In Illinois, to prevail in a product liability action, an injured party must demonstrate that he was injured, that the injury resulted from a condition of the product, that the condition was unreasonably dangerous, and that the unreasonably dangerous condition existed at the time the product left the Defendant's control. *Aetna Insurance v. Emilio Brothers Meat Co.*, 182 Ill. App.3d 863, 865-866, 538 N.E.2d 707 (1989). The evidence in this case overwhelmingly demonstrates that this Court should have granted Defendant's Motion for a Directed Verdict or, in the alternative, enter a judgment notwithstanding the verdict. In the alternative, the Court should enter an order granting Defendants a new trial on all issues. In a diversity action such as the case at bar, state law governs the disposition of a motion for a judgment notwithstanding the verdict. *F.W. Hempel & Co., Inc. v. Metal World, Inc.*, 721 F.2d 610, 613 (7th Cir. 1983). In Illinois, a judgment notwithstanding the verdict should be entered in those cases in which all the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill.2d 494, 510, 329 N.E.2d 504 (1967). In the alternative, for the new trial, the standard for reviewing a motion for a new trial is controlled by federal law. *Foster v. Continental Can Corp.*, 783 F.2d 731, 735 (7th Cir. 1986). A new trial may be granted only if the verdict is against the clear weight of the evidence. *Foster*, 783 F.2d at 735.

The verdict in favor of the plaintiff is against the manifest weight of the evidence for the following reasons: (a)

Plaintiff admitted that he did not actually recall what happened at the time of the accident, (p. 300 of trial transcript); (b) Plaintiff's expert, Mr. Kalin, agreed that the plaintiff's arm contacted the teeth of the blade from the bottom, and thus, the right lower guard would have had no effect; (c) Dr. Ericksson, the treating physician, testified as to a straight cut amputation; and (d) That the photographs of the injuries showed a clean 90 degree cut through the arm, which physically, could not be prevented by a right lower blade guard.

II

PUNITIVE DAMAGES SHOULD NEVER HAVE BEEN SUBMITTED TO THE JURY AND IN THE ALTERNATIVE, THEY WERE EXCESSIVE

In a diversity action, State law determines whether punitive damages are allowed. *In Re Air Crash Disaster near Chicago*, 644 F.2d 594, 605-06 (7th Cir. 1981). In Illinois punitive damages may be awarded when torts are committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts wilfully or with such gross negligence as to indicate a wanton disregard of the rights of others. *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 186, 384 N.E.2d 353 (1978). In a products liability situation, the standard is whether the manufacturer's conduct constituted flagrant disregard for public safety. *J.I. Case Co. v. McCartin-McAuliffe*, 118 Ill.2d 447, 453, 516 N.E.2d 260 (1987). When punitive damages are assessed, they are allowed in the nature of punishment and as a warning and example to deter the defendant and others from committing like offenses in the future. *Kelsay*, 74 Ill.2d at 186. Further, in Illinois, courts must exercise caution to see that punitive damages are not awarded improp-

erly or unwisely. *Cornell v. Langland*, 109 Ill. App.3d 472, 475, 440 N.E.2d 985 (1982).

In the case at bar, Plaintiff relied upon evidence of post-occurrence standards, accidents, and modifications for his award of punitive damages. Only prior occurrences are relevant to establish a plaintiff's claim for punitive damages. *Moore v. Remington Arms Co.*, 100 Ill. App.3d 1102, 111, 427 N.E.2d 608 (1981). In any event, evidence established that BLACK & DECKER had manufactured and sold 106,000 power miter box saws prior to this accident and yet, plaintiff was only able to prove the existence of three actions, including his own injury. As in *Moore* and *Loitz v. Remington Arms Co., Inc.*, 138 Ill.2d 404, 563 N.E.2d 397 (1990), the plaintiff in this case was injured on an open and obvious and inherently dangerous instrumentality. The mere fact that other persons had been injured while using the BLACK & DECKER power miter saw does not in and of itself support the existence of a defect. Here, the low percentage of any accidents while using the power miter box saw is conclusive on the issue that defendants did not act in a wilful and wanton manner towards the plaintiff and consumers in general. *Loitz*, 138 Ill.2d at 420.

Even the plaintiff's expert testimony was insufficient to warrant imposition of punitive damages in this case. Mr. Clark testified to discussing the need for a guard with Mr. Ruth. Yet, the parties stipulated that Mr. Clark no longer worked with BLACK & DECKER at the time this alleged conversation took place. In other words, the conversation never could have possibly occurred. Even assuming, however, that the conversation did take place, punitive damages cannot be awarded to punish or to deter reasonable actions simply because of an error in judgment. *Kohlmeier v. Shelter Insurance Co.*, 170 Ill. App.3d 643,

658, 525 N.E.2d 94 (1988). Testimony that BLACK & DECKER knew that a right lower blade guard may have been feasible to include on the saw does not mean that its judgment not to include the guard was unreasonable. *Loitz*, 138 Ill.2d at 425-26. At that time, and considering the facts that no standards required a right lower blade guard, the motor acted as a guard, and the manner in which the plaintiff's accident occurred, the actions of BLACK & DECKER did not rise to the level of a flagrant disregard for public safety. The low level of accidents also establishes that BLACK & DECKER did not have a flagrant disregard for users.

Certainly, even the testimony of Mr. Clark does not establish that BLACK & DECKER had "bad motives" or flagrantly disregarded the safety of consumers. In determining whether punitive damages are available in a given case, one must look at the defendant's motives, purpose, and state of mind. See *Allabastro v. Cummins*, 90 Ill. App.3d 394, 400, 413 N.E.2d 86 (1980); *St. Ann's Home For The Aged v. Daniels*, 95 Ill. App.3d 576, 580, 420 N.E.2d 478 (1981). (It is not so much the tort committed as the motive and conduct in committing it that is the basis for awarding punitive damages.) While BLACK & DECKER may have foreseen an accident such as the plaintiff's occurring, BLACK & DECKER's conduct cannot properly be characterized as wanton, malicious or oppressive. There is no evidence by which BLACK & DECKER knew or intended injury such as Mr. Ross' to occur.

It should also be noted that the purpose of punitive damages is to act as a deterrent effect as well as to punish. In this instance, since BLACK & DECKER now places the guards upon the saw, there is no need to assess punitive damages to act as a deterrent. Further, it should also be noted that the compensation awarded to all in-

jured plaintiffs would in itself act as a deterrent. This is not the sort of situation where compensatory damages do not act as a deterrent, and in the absence of other effective means of deterrence, punitive damages must be permitted. See, *e.g.*, *Kelsay*, 74 Ill.2d at 186-187.

Moreover, on the basis of the evidence in this case, the amount awarded was improper and bore no reasonable relationship to the conduct involved. The broad range of circumstances that may be taken into account by a jury in making a punitive damage award often invites the imposition of a large sum unrelated to the injury incurred. *Loitz*, 138 Ill.2d at 416. The goal of deterrence is the same in the context of products liability, but the unique concern is to deter manufacturers from placing dangerously defective products into the stream of commerce by making this unprofitable to a more predictable degree than punitive damages. Punitive damages are subject to abuse because they have little or no relation to the actual damages suffered by the plaintiff. *Moore*, 100 Ill. App.3d at 1113. In Illinois, because of their penal nature, punitive damages are not favored in the law and the courts must take caution to see that punitive damages are not improperly or unwisely awarded. *Kelsay*, 74 Ill.2d at 188. In the area of products liability, the susceptibility to abuse makes such control even more necessary. *Moore*, 100 Ill. App.3d at 1114.

Therefore, judicial scrutiny should be exercised in this case first, as to the imposition of punitive damages at all, and secondly as to excessive punishment. In the event that this Court does believe that punitive damages were properly allowed, the Court should still enter a remittitur to reduce the level of punishment to an appropriate level. This case does not establish a manufacturer's lack of concern for public safety, a spirit of utter indifference as to

whether the product might cause unnecessary injuries nor an overall magnitude of danger to the public. In short, BLACK & DECKER was punished for failing to install a guard that the company, in good faith, did not believe was needed. There has been no real evidence that it had any actual knowledge of the claimed defect. Since a saw is an inherently dangerous instrumentality, the mere occurrence of this accident or others, without more, does not establish outrageous misconduct or some other basis sufficient to warrant the imposition of punitive damages.

III

ANY EVIDENCE CONCERNING STANDARDS, POST-MANUFACTURE MODIFICATIONS, OR POST-ACCIDENT OCCURRENCES WERE INADMISSIBLE

In the case at bar, the Court allowed testimony concerning any standards promulgated after the date of the manufacture of the saw in question. In a similar manner, the Court allowed testimony concerning post-manufacture accidents, post-manufacture modifications etc.

The standards in question did not go into effect until well after July, 1978, the date of the manufacture of the miter box saw at issue. Allegedly, this evidence proved that the saw is unreasonably dangerous and that a safer, feasible alternative design existed. Admission of such evidence is not allowed under Illinois law. To be admissible, standards must be relevant in terms of both time and conduct involved. *Ruffiner v. Material Service Corp.*, 116 Ill.2d 53, 58, 506 N.E.2d 581, 584 (1987). Evidence of standards promulgated by industry, trade or regulatory groups subsequent to the date of the manufacture of the miter box saw would not be relevant in time, as these standards

were not even in existence at the date of the manufacture of the saw. See *Murphy v. Messerschmidt*, 68 Ill.2d 79, 84, 368 N.E.2d 1299 (1977). The admission of this subsequently drafted, released and promulgated industry standards violated the rules of *Murphy* and *Ruffiner*.

The Court relied upon cases such as *Jones v. Black & Decker Manufacturing Co.*, 22 Ill. App.3d 401, 559 N.E.2d 1004 (1990); *Pyatt v. Engel Equipment, Inc.*, 117 Ill. App. 3d 1070, 309 N.E.2d 225 (1974); *Turney v. Ford Motor Co.*, 94 Ill. App.3d 678, 418 N.E.2d 1079 (1981); and *Seward v. Griffin*, 116 Ill. App.3d 749, 452 N.E.2d 558 (1983). Those cases do not stand for the proposition that a plaintiff may use subsequently promulgated standards to show that a product was unreasonably dangerous at the time of manufacture. In *Pyatt* and *Turney*, the standards in question existed at the time of manufacture and therefore, were time relevant. Those cases dealt with whether standards directed to employers could be used by manufacturers to establish that the product was not unreasonably dangerous. In *Jones* and *Seward*, post-manufacture standards did not require the suggested safety feature and therefore were relevant because it would be illogical to hold a manufacturer responsible for failing to sell a product without certain precautionary measures when, years later, government and industry standards still did not require them.

The opposite is not true. Subsequent experience or technological changes may dictate changes in design standards after the manufacture of a product. A manufacturer, however, cannot be held responsible for the product manufactured before the change in the standard. Holding a product not in violation of a standard when manufactured, to a standard issued after manufacture, is the same as convicting a person under an *ex post facto* law.

Turning to the post-manufacture modifications, the Court also allowed evidence that BLACK & DECKER *did* add a right lower guard blade once required to do so under the UL standards. This too was error. Federal Rule of Evidence 407 prohibits evidence of subsequent remedial measures. Further, design changes developed after the manufacture of the product in question are irrelevant to the reasonableness of the design at the time of manufacture. *Roberts v. Harnischfeger Corp.*, 901 F.2d 42, 44 (5th Cir. 1989). The only possible exception to Rule 407 would be feasibility of precautionary measures; Defendants, however, admitted that the guard was feasible, just unnecessary. The introduction of such evidence, either by way of testimony or by showing the jury later model miter boxes would be prejudicial without having any probative value. *See, e.g., Sutkowski v. Universal Marion Corp.*, 5 Ill. App.3d 313, 281 N.E.2d 749 (1972); *Northern Trust Col. v. The Upjohn Co.*, Nos. 89-2165, 90-2244, 90-2357 Slip Opinion at 14 (Illinois Appellate Court, First District, Opinion issued April 26, 1991) (postoccurrence warnings are inadmissible).

In a similar manner, Plaintiff should not have been allowed to mention any prior or subsequent accidents involving the product in question. Any mention of post-accident events would have no probative value of notice of defect, feasibility or to punitive damages. Any mention of the post-accident occurrences would only serve to prejudice and inflame the jury without providing any information regarding alleged notice to the Defendant. Hence, all evidence of the Stukel accident should have been barred.

In order to show that a manufacturer had prior knowledge of similar accidents, a showing must be made that the other accidents were substantially similar to those sur-

rounding the accident in question. *Tripp v. Bureau Service Corp.*, 62 Ill. App.3d 998, 1006, 379 N.E.2d 324 (1978). While similar prior accidents may be admissible, there is no showing that any of the accidents which Plaintiff submitted were substantially similar. The evidence clearly establishes that each of these accidents had different circumstances, different cut types, different saws, different defects, even different time frames with regard to when the products were designed and manufactured. As the circumstances and similarity of the other accidents become less similar, the probative value decreases, but the danger of unfair prejudice remains. *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1268 (7th Cir. 1988).

IV.

THE TRIAL COURT ERRED IN QUASHING THE DEPOSITION OF MR. RUTH

Mr. Ruth, a former BLACK & DECKER employee, was listed on the Pretrial Order witness list. Plaintiff's expert allegedly had a conversation with Mr. Ruth in which he suggested that a right lower blade guard be attached to the power mitre box saw—a suggestion Mr. Ruth allegedly rejected. Mr. Ruth's testimony would have refuted Clark's explanation as not only false, but impossible to have occurred.

Three weeks before trial, BLACK & DECKER located Mr. Ruth, but learned that he has cancer, which is probably terminal. Further, Mr. Ruth now receives chemotherapy every day near him home in Lancaster, Pennsylvania. Because of his medical condition and ongoing chemotherapy, he is unable to travel to Chicago in person to testify. This Court quashed the notice of the deposition of Mr. Ruth and thus prejudiced the Defendant from pre-

serving his testimony and from presenting his testimony during the trial.

In light of the Court's action, BLACK & DECKER arranged to have Mr. Ruth's testimony broadcast live over closed circuit television from Lancaster, Pennsylvania, to a location only three blocks from the courthouse. The facility was adequate to accommodate the judge, jury, court reporters and all attorneys. BLACK & DECKER further agreed to bear the entire expense of this closed circuit broadcast, since such transmission in the courthouse would be impossible due to a lack of necessary telephone hookups.

Under Rule 32(a)(3), defendants attempted to submit Mr. Ruth for his deposition prior to trial. Because of his grave illness, his location outside the subpoena power of this Court, and because of the critical nature of his testimony, the denial of defendants' attempts to preserve his testimony was extremely prejudicial. See *Charles v. Wade*, 665 F.2d 661 (2nd Cir. 1982), *cert. denied*, 460 U.S. 1036, 103 S. Ct. 1426, where the district court improperly denied a motion to take a deposition after discovery had closed for the purpose of providing the deposition in lieu of live testimony.

The above stated error becomes more egregious when viewed in light of the Court allowing the plaintiff to file interrogatories and to compel this defendant to answer said interrogatories within seven days even though discovery had been closed.

V

THE TESTIMONY OF MR. SAFFELL FROM AN UNRELATED TRIAL, NOT USED AS IMPEACHMENT, NOT LISTED TO THE PRE-TRIAL ORDER WAS IMPROPERLY ALLOWED

Local Rule 5.00 governs the admissibility of testimony. Each party shall list which witnesses will be called to testify live at trial. Absent good cause shown, a witness who is not listed cannot be called except as a rebuttal witness. Rule 5.00(d). Plaintiffs listed Mr. Saffell as a witness who would be called live. Over objection, defendants would have produced Mr. Saffell live as requested or ordered by the Court. No such request was ever made.

Instead, plaintiffs read portions of his trial testimony from another unrelated trial in lieu of calling him live. This was not rebuttal nor impeachment since it was offered in plaintiff's case in chief.

If a party is planning to read parts of deposition or trial testimony, it is the burden of party intending to read that testimony to designate that testimony in the pretrial order. It is otherwise unavailable for evidence at trial. Rule 5.00(f). Such designations allow the responding party to object to or offer rebuttal testimony to such designated testimony.

No designation of the prior trial testimony of Mr. Saffell was ever provided, nor disclosed on any deposition list. Defendants had no opportunity to object to the testimony as provided in Rule 5.0. Further, BLACK & DECKER would have produced Mr. Saffell live at trial once ordered to do so. As an employee under the control of the defendant, he was never "unavailable" as defined in Federal Rule Civ. Pro. Rule 32(a) or Federal Rule of Evidence 804.

Testimony by deposition is less desirable than oral testimony and should be used only if the witness is unavailable to testify in person. *Salsman v. Witt*, 466 F.2d 76, 79 (10th Cir. 1972). Saffell's prior trial testimony from a dissimilar case, not only violated Local Rule 5.00, but effectively precluded defendants from providing a full background of the circumstances surrounding that testimony, from explaining the meaning of that testimony and from offering rebuttal testimony. Instead, plaintiff was able to highlight parts of his prior testimony to their best advantage, out of context and without warning. This is neither fair nor equitable and was extremely prejudicial to defendant. Had Saffell been allowed to testify live, as described in the Pretrial Order, plaintiff would have had a full and fair opportunity to question him, while the prejudice to the defendant would have been minimized.

If prior testimony is to be used at pretrial, all exhibits used at the previous setting must be available at the retrial. No such attempt was made here. Finally, said testimony was irrelevant since it dealt entirely with record retention and destruction and did not relate to the relevant issues in this case. The facts in the other trial were significantly different than this case.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Defendant, BLACK & DECKER, prays that this Court grant it a judgment on all issues notwithstanding the verdict, or in the alternative, a new trial, or in the alternative, a remittitur.

/s/ ALGIMANTAS KEZELIS
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No. 92-1082

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BLACK AND DECKER, INC.,
Petitioner,

v.

JERRY L. ROSS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondent's brief in opposition is replete with procedural arguments that are both factually and legally incorrect. These arguments, incessantly repeated throughout respondent's lengthy 30-page opposition, are nothing more than a transparent attempt to avoid this Court's review of issues of obvious substantive importance. In distorting the record below and relying on tenuous procedural arguments, respondent makes no attempt to reconcile the demonstrated conflict as to the nature and extent of the post-verdict review of punitive damages awards required by federal courts exercising diversity jurisdiction after *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991). Moreover, by ignoring the substantive grounds supporting Petitioner, Black & Decker (U.S.) Inc.'s ("Black & Decker") petition for certiorari, respondent concedes that the post-verdict re-

view of the punitive award by the Federal District Court for the Northern District of Illinois ("District Court") and the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") violates Black & Decker's fifth amendment due process rights and seventh amendment right to trial by jury. In short, respondent presents no reason for this Court to deny Black & Decker's petition.

1. Respondent claims that Black & Decker waived its right to *Haslip*-type post-verdict review of the punitive award in the District Court and the Seventh Circuit. Respondent seeks to divert this Court's attention from the uncontroverted fact that Black & Decker, unlike the petitioner in *Browning-Ferris Industries v. Kelco*, 492 U.S. 257 (1989), preserved at all levels its right to meaningful post-verdict review of the punitive award necessary to ensure compliance with the due process guarantees of *Haslip*.[1] In an attempt to justify what even respondent concedes is an "admittedly sparse" post-verdict review (Opp. 22), respondent resorts to blatant distortions of the record before the District Court. Respondent appends to his opposition Black & Decker's memorandum of law in support of its motion for judgment notwithstanding the verdict and alternative motion for a new trial. Respondent then represents to this Court that in this memorandum, Black & Decker "spent virtually no time discussing the question of punitive damages," and reasons that "the District Court's purported 'failure' to consider the non-arguments presented by Black and Decker is easy to understand." Opp. 23.

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[1] Indeed, respondent's reliance on *Browning-Ferris* in misplaced. Opp. 2. There, petitioner failed to raise its constitutional arguments before the district court, court of appeals and in its petition for certiorari to this Court. 492 U.S. at 277. In sharp contrast, Black & Decker preserved its constitutional arguments throughout the appellate process.

Far from being "tardily raised," (Opp. 2), Black and Decker dedicated five pages in its post-trial memorandum to the inappropriateness of the underlying punitive liability and specifically objected, in the alternative, to the punitive damages award on the grounds of excessiveness, and lack of proportionality to the conduct involved and the severity of the injury incurred.[2]

> Moreover, on the basis of the evidence in this case, the amount awarded was improper and bore no reasonable relationship to the conduct involved. The broad range of circumstances that may be taken into account by a jury in making a punitive damage award often invites the imposition of a large sum unrelated to the injury incurred . . . . Therefore, judicial scrutiny should be exercised in this case first, as to the imposition of punitive damages at all, and secondly as to excessive punishment. In the event that this Court does believe that punitive damages were properly allowed, the Court should enter a remittitur to reduce the level of punishment to an appropriate level.

Opp. App. 16 (citations omitted). Black & Decker expressly requested that should the District Court find punitive damages warranted under the evidence, it scrutinize the punitive award for excessiveness and lack of proportionality—factors deemed by this Court in *Haslip* as constitutionally mandated to ensure compliance with due process. *Haslip*, 111 S. Ct. at 1045. The District Court, however, ignored this request in denying Black & Decker's post-trial motions and upholding the punitive damages award. Pet. App. 22a-24a. While respondent purports to "understand" this omission, due process guarantees cannot even begin to countenance the failure of the District Court to conduct any post-verdict review of the sizable punitive award, especially in light of Black & Decker's

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[2] This section is captioned: "Punitive Damages Should Never Have Been Submitted To The Jury And In The Alternative, They Were Excessive." Opp. App. 13.

express request that it do so. Contrary to respondent's distortions of the record, alternative prayers for relief are not tantamount to waiver. Black & Decker plainly preserved its constitutional right to *Haslip*-style post-verdict review of the punitive damages award by the District Court.

2. Black & Decker specifically raised and preserved its constitutional objections and right to meaningful post-verdict review of the punitive damages award in the Seventh Circuit. Respondent concedes that Black & Decker's appellate brief before the Seventh Circuit specifically cited *Haslip* in support of its argument that the "award of punitive damages in this case 'violated the due process clause of the United States Constitution.'" Opp. 18. In highlighting the failure of the District Court to conduct any post-verdict review of the punitive damages award, Black & Decker stated in its reply brief:

> As the United States Supreme Court recognized in *Pacific Mutual Life Insurance Company v. Haslip*, —— U.S. ——, 111 S. Ct. 1032, 113 L.Ed.2d 1 (1991), this case denied Black & Decker due process because the trial court did not provide any guidance or otherwise provide a sufficiently definite and meaningful constraint on the jury's deliberations. Their unfettered award occurred because the court also allowed unrestricted evidence of post-manufacture events, standards, etc., which did not provide any procedural protections to adequately control the discretion of the jury in fashioning the award.[3]

Despite Black & Decker's renewed objection to the actions of the District Court, and request for *Haslip*-style post-verdict review in both its original and reply briefs, the Seventh Circuit, like the District Court below, disre-

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[3] Black & Decker attaches to the appendix an excerpt from its reply brief on appeal to the Seventh Circuit to demonstrate that contrary to respondent's assertions, Black & Decker pressed its constitutional arguments in the Seventh Circuit.

garded them. Given this omission, Black & Decker then submitted its Petition for Rehearing And Suggestion, In the Alternative, For Rehearing In Banc setting forth in detail the constitutional issues voiced below, describing the constitutional violations evident within the Seventh Circuit's opinion, and raising the questions now presented in its petition for certiorari to this Court. Thus, contrary to respondent's mischaracterizations, Black & Decker properly raised and advanced in the Seventh Circuit its constitutional objections to the punitive award and its request for *Haslip*-type review.[4]

3. To further divert this Court's attention from the substantive issues raised in the petition for certiorari, respondent premises his waiver contention on Black & Decker's purported failure to object to the District Court's jury instruction on punitive damages. In so doing, respondent misconstrues the basis of Black & Decker's constitutional argument. Black & Decker does not contend that an incorrect punitive damage jury instruction was given by the District Court. Rather, Black & Decker challenges the post-verdict review of the punitive damages award conducted in the District Court and Seventh Circuit.

Black & Decker's alleged failure to object to the jury instruction on punitive damages does not prejudice its due process rights to post-verdict review of the punitive damage award. Post-*Haslip*, the failure to object to a punitive damage jury instruction does not impair a litigant's constitutional right to meaningful post-verdict review of any punitive award. In *Cole v. Control Data Corp.*, 947 F.2d 313 (8th Cir. 1991), the Eighth Circuit held:

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[4] Respondent's unsupported recollection of the oral argument before the Seventh Circuit provides no basis for denying Black & Decker's petition. Indeed, the fact that the Seventh Circuit remitted the punitive damage award despite the purported and explicit "waiver" belies respondent's contention.

> Control Data argued generally that the award of punitive damages is unconstitutional, but made no claim as to the constitutional deficiency of the instruction. We are concerned, however, whether the district court has appropriately reviewed the punitive damage award. We believe that remand is required so that the district court may conduct this review under the standards that are articulated in *Haslip*, . . .

Id. at 320. Similarly, in *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 930 F.2d 1342, 1347 (8th Cir. 1991), the Eighth Circuit remanded the case to the district court to conduct a post-verdict analysis of the punitive damages award under Arkansas law and *Haslip*, despite the failure of the appellant to object to the punitive damages jury instruction. In remanding, the Eighth Circuit held it was "unable to evaluate the adequacy of the district court's review of the award" given that it "denied summarily" the motion to remit the punitive damages award. *Id.*; *see also Doe by Doe v. B.P.S. Guard Services, Inc.*, 945 F.2d 1422, 1428 (8th Cir. 1991) (remanding to district court for post-verdict review under Missouri law and *Haslip* despite lack of objection to punitive damage jury instruction).

Here, the District Court violated Black & Decker's due process rights by its cursory approval of the punitive award without any post-verdict analysis of whether that award comports with Illinois law and *Haslip* principles. The Seventh Circuit expressly recognized that the District Court "provided no further explanation of its reasoning" beyond stating "the award was not 'excessive or unreasonable under the evidence.'" Pet. App. 20a. By affirming the District Court's "admittedly sparse" review of the punitive award, the Seventh Circuit failed in its obligation to remand the case for further proceedings in the District Court. Black & Decker's alleged failure to object to the punitive damage jury instruction, therefore, is irrelevant to the obligation of the District Court to conduct the required post-verdict analysis of the damages

awarded under that instruction. The due process issue before this Court focuses solely upon the failure of both the District Court and the Seventh Circuit to conduct the required post-verdict review of the punitive award in derogation of Black & Decker's fifth amendment due process rights.

4. Black & Decker's assent to the punitive damage jury instruction does not waive its seventh amendment right to proper post-verdict review of the punitive award. As set forth in its petition for certiorari, the Seventh Circuit violated Black & Decker's right to trial by jury by employing methodology in direct conflict with that adopted by the Fourth Circuit in *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), and *Johnson v. Hugo's Skateway*, 974 F.2d 1408 (4th Cir. 1992). Pet. 13-16. In *Hugo's Skateway*, the Fourth Circuit specifically held that the failure to object to the punitive damage instruction does not waive a litigant's seventh amendment right to have the trier of fact consider the post-verdict review criteria prescribed by controlling state law. *Id.* at 1415 n.5. In remanding the case for a new trial based upon the district court's violation of defendant's right to a trial by jury, the Fourth Circuit explicitly recognized that the defendant "has not contended that this instruction, based on Virginia common law, was erroneously given, . . ." *Id.*

Like the defendant in *Hugo's Skateway*, Black & Decker assented to the proposed punitive damage jury instruction. *Cf. Browning-Ferris Industries v. Kelco*, 492 U.S. 257, 280-81 (1989) (Brennan, J., concurring) (instruction not in error because it accurately reflected a Vermont law which, however, was probably unconstitutional). Unlike the Fourth Circuit, the Seventh Circuit failed to recognize that application of state law criteria not submitted to the jury through instruction violates Black & Decker's right to trial by jury. Constitutional error occurred because the Seventh Circuit, rather than the federal jury, made factual findings regarding how the

evidence introduced at trial satisfied, or failed to satisfy, the substantive requirements of Illinois state law. While the defects in the punitive damage instruction provided the predicate for the seventh amendment violation, the Seventh Circuit created the constitutional error. To avoid this constitutional error, the Seventh Circuit was compelled to follow the holding of the Fourth Circuit and remand for a new trial.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Black & Decker's petition for a writ of certiorari, this Court should grant a writ of certiorari.

Respectfully submitted,

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February 8, 1993

APPENDIX

APPENDIX

Excerpt from Pages 13 and 14 of Reply Brief of Appellant Black & Decker filed in the United States Court of Appeals for the Seventh Circuit (Nov. 8, 1991)

Finally, BLACK & DECKER notes that Plaintiff does not dispute its argument that the award of $10,000,000 in punitive damages violated the due process clause of the Fourteenth Amendment to the United States Constitution. (Appellant's Br. at p. 35). As the United States Supreme Court recognized in *Pacific Mutual Life Insurance Company v. Haslip*, —— U.S. ——, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), this case denied BLACK & DECKER due process because the trial court did not provide any guidance or otherwise provide a sufficiently definite and meaningful constraint on the jury's deliberations. Their unfettered award occurred because the court also allowed unrestricted evidence of post-manufacture events, standards, etc., which did not provide any procedural protections to adequately control the discretion of the jury in fashioning the award. For instance, the court did not instruct the jury that evidence of post-manufacture changes should only be considered as to the issue of feasibility and not to punitive damages. Hence, the instructions to the jury did not act as a constraint on its discretion. Furthermore, as noted above, the award is unreasonable inasmuch as it was five times more than the amount of the Plaintiff's compensatory damages and there is no evidence that the conduct in question rose to the level of reckless disregard.